Workplace Disputes: From Administrative Review to Trial

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Workplace Disputes: From Administrative Review to Trial

Authors

Michelle J. Douglass
Douglass Law Firm
Somers Point, NJ

Peter L. Frattarelli
Archer
Haddonfield, NJ

M. Trevor Lyons
Walsh Pizzi O'Reilly Falanga LLP
Newark, NJ

Ralph R. Smith III
Capehart & Scatchard, P.A.
Mount Laurel, NJ

Presenters

MICHELLE J. DOUGLASS is certified by the New Jersey Supreme Court as a civil trial attorney. Her practice is dedicated to helping those with legal employment and civil rights matters. As a certified civil trial attorney, Ms. Douglass shares the designation granted by the New Jersey Supreme Court to attorneys, who are able to demonstrate efficient levels of experience, education, knowledge, and skill in civil trial practice. Less than 2% of attorneys have the honor of this accreditation enabling them to advertise they have met the objective and rigorous standards approved by the U.S. Supreme Court and the American Bar Association. She has been named a Super Lawyer in the field of employment and labor law by *New Jersey Monthly Magazine*, April 2006 through 2015 editions. In 2013, Ms. Douglass appeared in the *Super Lawyers Business Law* edition for *Super Lawyers*. Ms. Douglass has received her Master of Studies in Law (MSL), concentration in employment and labor law from Widener University and continues to be actively interested in programs for the advancement of civil rights laws. She is also a member and public policy chair of the American Association of University Women-New Jersey, Atlantic County Branch; and serves as the AAUW-NJ director of Tech Trek, a STEM camp for girls in collaboration with Stockton University of New Jersey. Ms. Douglass has tried 125+ jury and non-jury trials and has advocated for clients in federal and state courts and before administrative law judges in New Jersey, Pennsylvania, Connecticut, New York, and Washington. Ms. Douglass is on the Advisory Board of the Atlantic County Institute of Technology.

PETER L. FRATTARELLI is a partner with Archer & Greiner P.C., where he is the chair of the Labor and Employment Department. Mr. Frattarelli regularly represents management and employers in labor and employment litigation and proceedings. He is a member of the New Jersey State Bar Association (including an Executive Committee position with the Labor and Employment Law Section); Delaware State Bar Association; American Bar Association; Camden County (New Jersey) Bar Association; barrister, Sidney Reitman Labor and Employment Law Inns of Court; and Justinian Society (Italian-American attorneys organization). Mr. Frattarelli is admitted to practice in Delaware, Pennsylvania and New Jersey and before the U.S. Supreme Court, Third Circuit Court of Appeals, and the U.S. District Court (Delaware, Eastern District of Pennsylvania and District of New Jersey). He earned his B.S. degree from Drexel University and his J.D. degree, magna cum laude, from Widener University School of Law.

M. TREVOR LYONS is a partner in the labor and employment law practice group of Walsh Pizzi O'Reilly Falanga LLP. He has presented as a featured speaker, both nationally and regionally, on numerous traditional and cutting-edge employment topics. Mr. Lyons has devoted his entire career to representing employers, including privately owned businesses, international corporations, non-profit organizations, and institutions of higher education. He has extensive experience in defending employers in litigation. Mr. Lyons also represents employers in traditional labor matters, such as NLRB proceedings, union organizing campaigns, collective bargaining, labor arbitrations, enjoining strike misconduct and unlawful picketing, and related matters. He earned his B.A. degree from Johns Hopkins University and his J.D. degree from Washington University School of Law. Mr. Lyons is a former member of John J. Gibbons American Inn of Court and former co-chair of the Program Committee of the Sidney Reitman American Inn of Court.

Presenters (Cont.)

RALPH R. SMITH III is a shareholder and co-chair of the labor and employment group of Capehart & Scatchard, P.A. Mr. Smith focuses his practice in employment litigation and preventative employment practices, including counseling employers on the creation of employment policies, non-compete and trade secret agreements, and training employers to avoid employment-related litigation. He represents both companies and individuals in related complex commercial litigation before federal states courts and administrative agencies in labor and employment cases, including race, gender, age, national origin, disability and workplace harassment and discrimination matters; wage-and-hour disputes; restrictive covenants; grievances; arbitrations; drug testing; and employment-related contract issues. Mr. Smith earned his B.A. degree, magna cum laude, from Temple University and his J.D. degree, cum laude, from Temple University School of Law.

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Processes, Procedures and Laws

Submitted by Peter L. Frattarelli

Peter L. Frattarelli
Member of New Jersey, Pennsylvania and Delaware Bars
pfrattarelli@archerlaw.com
856-354-3012 Direct
856-795-0574 Direct Fax

Archer & Greiner, P.C.
One Centennial Square
Haddonfield, NJ 08033
856-795-2121 Main
856-795-0574 Fax
www.archerlaw.com

WORKPLACE DISPUTES: FROM ADMINISTRATIVE REVIEW TO TRIAL

By: Peter L. Frattarelli

National Business Institute

"Processes, Procedures and Laws"

Atlantic City, New Jersey

THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.

I. WAGE AND HOUR CLAIMS

General Overview

While the Fair Labor Standards Act ("FLSA") has been in place without amendment for number of years, in 2004, the Federal Department of Labor in 2004 released the final version of what they call the Fair Pay Rules, which are the final revisions to the Department's overtime exemption regulations under the FLSA. They are found at 29 C.F.R. § 541. These regulations are the determining factor in defining who is and who is not exempt from the minimum wage and overtime requirements of the FLSA as an exempt Executive, Administrator, Professional, Outside Salesman or Computer Worker.

However, additional changes will go into effect on January 1, 2020, which will be: (i) Increasing the minimum salary for salary basis test from $455 per week to $684 per week, indexed to actual wage rates each year; (ii) increasing minimum salary for highly compensated individuals from $100,000 per year to $107,432 per year; and (iii) permitting employers to use nondiscretionary bonuses and incentive pay (i.e., commissions) to satisfy up to ten percent (10%) of an employee's salary level, for determining the employee's salary basis.

A. Exemptions From Overtime - Overview

Federal Regulations exempt from overtime several classes of employees. These exemptions are termed the "White Collar" exemptions, and cover bona fide Executives, Administrators, Professionals, Outside Salespeople or Computer Workers. With a few exceptions, three broad requirements must be met for an employee to be exempt under one of the

white collar exemptions: (1) Salary Level Test: Employee must be paid a certain weekly minimum; (2) Salary Basis Test: Employee must be paid on a salary (rather than hourly) basis; and (3) Duties Test: Employee must perform certain exempt duties, as set out in the specific exemptions.

B. Federal Exemption Regulations - Overview

With respect to the Salary Level, the varying weekly salary thresholds were eliminated. They were replaced in 2004 with a single minimum weekly salary of at least $455 for eligibility. Effective 1/1/20, this will increase to $684/week. With respect to the Salary Basis, although the salary basis test largely remained the same, the new regulations made changes to allow for certain deductions which were not allowed in the past. States will either have to follow the new federal regulations, or promulgate its own differing standards. Lastly, as far as the Duties Test, the 2004 regulations simplify and clarify the duties tests. The regulations eliminate the long test altogether under federal regulations.

II. Minimum Salary for Eligibility for Exemptions

To qualify for an exemption, an employee must be paid a minimum weekly salary of $455 (or $23,600 per year). 29 C.F.R. §541.600(a). Effective 1/1/20, this will increase to $684/week, or $35,568 annually.

Meeting the minimum salary is only the first step of the inquiry. The value of meals, lodging or other facilities may not be counted in reaching $455. Effective 1/1/20, employers will be permitted to use nondiscretionary bonuses and incentive pay (i.e., commissions) to satisfy up to ten percent (10%) of an employee's salary level, for determining the employee's salary basis.

Further, no prorating is allowed. Weekly salary threshold is an absolute minimum for a worker to qualify for a white-collar exemption, regardless of whether he or she works part- or full-time.

Action Point: This may make it impossible to make certain part-time employees exempt. This would only really matter if the employee worked some weeks over 40 hours.

Other than renumbering, exceptions to the salary basis test remain the same. The following are exempt from salary level test.

(a) Outside sales employees. 29 C.F.R. §541.500.

(b) Certain hourly computer workers paid at least $27.63 per hour. 29 C.F.R. §541.600(d).

(c) Certain employees of the video and filmmaking industries. 29 C.F.R. §541.709.

(d) Academic administrative employees may be paid less than $455 as long as they receive a salary no less than the entrance salary paid to teachers in the same institution. 29 C.F.R. §541.600(c).

(e) Doctors, lawyers and teachers. 29 C.F.R. §§541.303 and 304.

Administrative and Professional employees may be paid on a fee basis, as long as it would result in compensation of at least $455 per week/$684 per week if the employee worked

40 hours. 29 C.F.R. §541.605. **Action Point**: Review salary levels to insure that all exempt employees meet the $455/$684 threshold.

III. The White Collar Exemptions

FLSA regulations have five, primary "White Collar" exemptions: (1) Executive; (2) Administrative; (3) Professional; (4) Outside Sales; and (5) Computer Workers. In addition, the exemptions provide an exemption for highly compensated employees making at least $100,000 annually. Effective 1/1/20, this will increase to $107,432 annually. As always, salary and duties, not job titles, control the applicability of these exemptions.

Action Item: Review both job descriptions and what employees actually do to determine if employees are being properly classified.

A. Executive Exemption – Federal (29 C.F.R. §541.101, et seq.)

In addition to a minimum weekly salary of $455/$684, an executive employee must meet *all* of the 3 following prongs to be exempt from the FLSA minimum wage and overtime provisions:

(1) Primary Duty Test:

Employee's "primary duty" must be management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof." 29 C.F.R. §541.100(a)(2). "Management" is defined, per Section 541.102 of the regulations, as "management" by example of management activities. This is almost identical to former

regulation with the addition of two new recognized management activities: "planning and controlling the budget; and monitoring or implementing legal compliance measures."

As far as the "Primary Duty": One or more of these management duties must be the "primary duty" of the exempt employee. This is defined for all white collar exemptions at 29 C.F.R. §541.700(a)."'Primary duty' means the principal, main, major or most important duty that the employee performs." Determination is based on facts of employee's position and duties, including how much control employee has over when and how much non-exempt work to perform at any given time. Unlike before 2004, there are no percentage limitations on what is or is not a primary duty. It may be less than 50% if other factors support conclusion that exempt work is the primary duty. Lastly, "Department or subdivision" defined at 29 C.F.R. §541.103 as a grouping of employees with a permanent status and function., who need not have a permanent location or even a permanent base of employees.

(2) **Supervision**:

An exempt executive must "customarily and regularly direct the work of two or more other employees." 29 C.F.R. §541.100(a)(3). "Customarily and regularly" is defined for all white collar exemptions as being more than occasional but which may be less than constant. 29 C.F.R. §541.701. "Two or more other employees" means two full-time employees, or their equivalent – e.g., one full-time and two-part time employees. 29 C.F.R. §541.104(a). Supervision only in the actual manager's absence does not meet this requirement.

(3) **Authority to change status**:

An exempt employee must have "the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." 29 C.F.R. §541.100(a)(4). "Particular weight" is defined in 29 C.F.R. §541.105. It will include whether making recommendation is part of employee's job duties and the frequency such recommendations are made and relied on. It also may have particular weight even if higher level recommendation has more importance or if employee does not have ultimate authority to change status. Under these regulations, significant authority to reprimand, suspend or evaluate an employee is not enough. Must be authority to change status (hire, fire, promote, demote, etc.) The authority to change status requirement was a factor in the old federal long-test, which was largely dormant, since there was only a $13,000 threshold for the application of the short-test, which did not require authority to change status. Authority to change status has always been a factor under the New Jersey regulations.

B. Administrative Exemption – Federal (29 C.F.R. §541.201 et seq.)

The 2004 "white-collar" employee exemption revisions to the FLSA also eliminated the "long" and "short" duties test for the administrative exemption and replaced them with a new "standard" test. There is little change from the old short-test. In addition to a minimum weekly salary of $455/$684, an administrative employee must meet both of the 2 following prongs to be exempt from the FLSA minimum wage and overtime provisions:

(1) **Primary Duty 1**:

"Primary duty" must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. §541.200(a)(2). "Primary Duty" defined the same as discussed above in the federal executive exemption. See 29 C.F.R. §541.700(a). "Office or Non-Manual Work" is meant to distinguish exempt work from non-exempt work performed by blue collar employee and first responders, such as police and fire personnel. "Management or General Business Operations" refers to work which is directly related to the running or servicing of the business, as distinguished from "working on a manufacturing production line or selling product in a retail or service establishment." 29 C.F.R. §541.201(a). There are multiple examples provided in regulation. 29 C.F.R. §541.201(b).

(2) **Primary Duty 2**:

"Primary duty" must include "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. §541.200(a)(3). "Exercise Discretion and Independent Judgment" would generally involve "comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. §541.202(a). Implies more than following a "recipe" or preordained plan, even if complex. The fact that employee does not have final say is not fatal to exemption. Further, "Matters of Significance" implies more than simple financial loss if the employee errs. Must be important to the management of the business.

C. Professional Exemption - Federal (29 C.F.R. §541.301 et seq.)

Under FLSA regulations, there are two avenues for a worker to be considered a bona fide professional: the "learned professional" exemption and the "creative professional" exemption.

1. Learned Professional

A learned professional must meet three duties requirements to be considered exempt from the FLSA's minimum wage and overtime pay requirements (29 C.F.R. §541.301(a)). The primary duty must be the performance of work: (a) Requiring knowledge of an advanced type; (b) Knowledge must be in a field of science or learning; and (c) the knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. "Advanced knowledge" is "work which is predominantly intellectual in character and which includes work requiring the *consistent* exercise of discretion and judgment" (emphasis by DOL). Advanced knowledge cannot be attained at the high school level.

As in the former regulations, the 2004 professional exemption rules require "the consistent exercise of discretion and judgment." However, this standard for purposes of the professional exemption is less stringent than the "exercise of discretion and independent judgment" that is a requirement of the administrative exemption (see 29 C.F.R. §541.202). A prolonged course of specialized intellectual instruction means more than the requirement of a general 4 year degree. And, a field of science or learning is more expansive than the scientific disciplines or teaching.

2. Creative Professionals

The 2004 requirements for a worker to be considered exempt from the FLSA's minimum wage and overtime pay requirements as a creative professional are different than the former rules only in the addition of the term "originality" to the duties test. The creative professional exemption is available for a worker "whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." 29 C.F.R. §541.300. The creative professional exemption generally applies to actors, musicians, composers, painters, essayists and screenwriters. The exemption generally does not apply to a worker who does not exercise much originality, such as a motion-picture animator who simply draws repetitive pictures according to a plan.

The U.S. Department of Labor provides specific examples of exempt professionals.

(a) Registered or Certified Medical Technologists

(b) Registered Nurses

(c) Dental Hygienists (with four years pre-professional and professional academic study in accredited program)

(d) Physicians Assistants

(e) Accountants

(f) Chefs and Sous Chefs (with four year specialized degrees from culinary arts programs)

(g) Athletic Trainers (with four years pre-professional and professional academic study in accredited program)

(h) Funeral Directors or Embalmers (where licensed and with four years pre-professional and professional academic study in accredited program)

In contrast, the following job positions are generally non-exempt

(a) Licensed Practical Nurses and similar health care employees.

(b) Accounting Clerks, Bookkeepers, and others normally performing routine work.

(c) Cooks

(d) Paralegals

D. Outside Sales Worker Exemption – Federal (29 C.F.R. §541.500)

In the 2004 regulations, DOL eliminated the requirement that an outside sales worker spend no more than 20% of his or her time engaged in non-sales activities in order to qualify for this exemption. Instead, the 2004 rules contain a "primary duty" concept, similar to that contained in the exemptions for executive, administrative and professional workers. To be eligible for the outside sales exemption, an employee must meet the following test. 29 C.F.R §541.500. The employee's primary duty must be (a) "customarily and regularly" working away

from his or her employer's place of business; and (b) "making sales" or "obtaining orders or contracts for services or the use of facilities for which consideration will be paid by the client or customer.

An outside sales employee must have a primary duty of work that is "incidental to or in conjunction with" his or her own sales, or work that "furthers the employee's sales efforts," to qualify for the exemption (29 C.F.R. §541.500(2)(b)). The regulations define the phrase "furthers the employee's sales efforts" as including writing sales reports, planning itineraries and attending sales conferences. Under 29 C.F.R. §541.501, a sale consists of "any sale, exchange, contract to sell, consignment for sale, or other disposition," including the "transfer of title to tangible property." Sales work must be done away from employer's regular place of business. Workers whose primary duty is making sales through the mail, telephone or the Internet do not qualify for the outside sales exemption (29 C.F.R. §541.502).

E. Computer Worker Exemption - Federal (29 C.F.R. §541.400)

The FLSA overtime exemption 2004 regulations consolidated the computer exemption provisions, which had been widely dispersed in the old regulations. To qualify for the computer employee exemption under the 2004 regulations, an employee must receive a salary of at least $455 /$913per week, or an hourly rate of at least $27.63 per hour. In addition, a worker must be employed as a computer systems analyst, computer programmer, software engineer, or in another "similarly skilled" field, and his or her primary duty must consist of one of the following:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

The 2004 regulations specify that the exemption for computer employees does not include those "engaged in the manufacture or repair of computer hardware and related equipment." 29 C.F.R. §541.401. In addition or in lieu of being an exempt professional, a computer worker may also be exempt as an executive or administrative employee. 29 C.F.R. §541.402.

F. Exemption for Highly Compensated Employees (29 C.F.R. §541.601)

This exemption uses a bright line test for employees making over $100,000/$107,432 per year. This is a simplified calculation based on assumption that most highly compensated employees are likely to meet criteria for executive, administrative or professional exemption. 29

C.F.R. §541.601 allows employers to classify an employee as exempt if: (1) Employee earns at least $100,000/$107,432 a year (at least $455/$684 per week of which is paid on a salary basis); (2) employee customarily and regularly performs at least one of the exempt responsibilities of an exempt executive, administrative or professional employee; and (3) employee's primary duty involves performing office or nonmanual work. The highly compensated worker exemption does not apply to blue-collar workers (29 C.F.R. §541.601(d)), no matter how highly paid.

To satisfy the duties test requirement, a highly compensated worker must "customarily and regularly" perform at least one of the exempt duties of the executive, administrative or professional exemptions:

- Management of the enterprise or a customarily recognized department or subdivision (executive exemption);
- Customarily and regularly direct the work of two or more employees (executive exemption);
- Have the authority to hire or fire, or make suggestions and recommendations as to hiring, firing or other change in status that are given particular weight (executive exemption);
- Perform office or nonmanual work related to management or general business operations of employer or employer's customers (administrative exemption);

- Exercise discretion and independent judgment with respect to matters of significance (administrative exemption);
- Perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction (professional exemption); or
- Perform work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (professional exemption).

For this exemption, "Customarily and regularly" is defined as "greater than occasional but may be less than constant, and it includes work normally and recurrently performed every workweek but does not include isolated or one-time tasks." 29 C.F.R. §541.701. There are alternative ways to meet the $100,000/$107,432 threshold. The $100,000/$107,432 MUST include $455/$684 weekly paid on a salary or fee basis ($35,568 annual). The 100,000/$107,432 may include commissions, nondiscretionary bonuses and other nondiscretionary compensation. (29 C.F.R. §541.601(b)(1)). Also, the wages must be earned during a 52-week period. The $100,000/$107,432 may not include credit for board or lodging, contributions to retirement plans or other fringe-benefit payments, including medical or life insurance.

Many highly compensated employees are paid a significant portion of their pay in the form of commissions, profit sharing or other incentive pay which is not calculated by the end of the year. The regulations allow an employer to provide a "make-up" payment to count toward the $100,000/$107,432 threshold if the "make-up payment" is paid within one month after the

close of the year. 29 C.F.R. §541.601(b)(2). The make-up payment cannot count towards both past and current year's wages for purposes of highly compensated threshold.

The $100,000/$107,432 may be prorated, based on the number of weeks employed, for a highly compensated employee who works only part of the year. However, bonus, commission or other incentive plans which "vest" only on the completion of a particular period of time after the bonus or commission is "earned" can create trouble where the employee terminates prior to vesting. The non-payment of the incentive compensation may preclude application of highly compensated employee exemption if threshold or prorated threshold is not otherwise met. Any 52 week period (chosen beforehand) may be chosen as the measuring period. If no choice is made, the calendar year will apply. 29 C.F.R. §541.601(b)(4).

Failure to meet $100,000/$107,432 threshold, either during year or in make-up period precludes use of highly compensated employee exemption. Employee may still be exempt under any of the other exemptions if he or she meets the salary and duties test for the exemption.

IV. Salary Basis Test

A. Introduction

Workers generally must be paid on a salary basis to qualify for one of the white-collar exemptions. That is, the employee must receive each pay period a predetermined amount that is not subject to reduction based on the quality or quantity of work performed. The $455/$684 threshold minimum may be translated to biweekly, semimonthly, or monthly (29 C.F.R. §541.600(b)). Exceptions to salary basis test for doctors, lawyers, teachers, certain computer

workers and outside sales employees, who do not need to be paid on a salary basis, remain the same.

Salary basis, and importantly, the exemption it supports, may be lost if improper deductions are made to salary. Improper deductions have led to huge verdicts because courts have often determined that the improper deduction caused the loss of the exemption for entire classes of employees.

B. Deductions From Pay for Exempt Employees

There are specific rules in place to determine how to handle deductions from pay for exempt employees:

1. Partial Day Deductions Not Allowed (No Change)

With one exception (FMLA leave, discussed below), deductions for partial day absences will destroy the salary basis test. 9 C.F.R. §541.602(a).

2. Full Day Deductions Generally Not Allowed (No Change)

Subject to overriding principal that exempt employee need not be paid for any week in which employee performs NO work, absences not caused by or at the choice of the exempt employee may not be deducted. The salary basis lost if deductions are made for "absences occasioned by the employer or by the operating requirements of the business." 29 C.F.R. §541.602(a). Further, exempt employees may not be docked for days missed due to jury duty, court attendance as a witness, or temporary military leave. 29 C.F.R. §541.602(b)(3).

3. Exceptions: Certain Full Day Deductions Allowed

Deductions for certain full day deductions are allowed. Exempt employees may be docked for one or more full days missed due to personal reasons, other than sickness or disability. 29 C.F.R. §541.602 (b)(1). Exempt employees may be docked for days missed due to illness, provided they are covered by a plan, policy or practice which compensates the employees for loss of salary occasioned by such sickness or disability. 29 C.F.R. §541.602 (b)(2). (No Change). Deductions for full day absences may be made for absences before employee qualifies for paid leave under the plan or after the employee has exhausted his time under the plan. Workers Compensation and temporary disability payments are included as compensation plans for absences covered by such plans. Lastly, reduction in full salary in first and last week of work for work days prior to and post-employment. 29 C.F.R. §541.602 (b)(6).

Deductions for "unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules." To take advantage of this new rule, suspensions must be imposed pursuant to a written policy applicable to all employees. **Action Point**: Discipline policies (including anti-harassment policies) should state explicitly that unpaid suspensions are a penalty option. It may not be enough to say "discipline up to and including termination." The regulation allows employers to impose suspension for exempt employees less than one full week.

Please note that workplace misconduct different from performance problems. The Department of Labor's Preamble to the new 2004 rules states that "workplace misconduct is serious misconduct, such as sexual harassment, workplace violence, substance abuse or violations of state or federal law. Disciplinary deductions should not be used for performance or attendance problems, but rather only for "serious workplace misconduct."

4. Monetary Penalties for Major Safety Violations Allowed

Penalties imposed in good faith for infractions of safety rules of major significance will not defeat an employee's exempt status. 29 C.F.R. §541.602 (b)(4). This deduction is in the nature of a fine, so it may be of a value of more or less than a day's pay.

5. Deductions due to Absences Due to Unpaid FMLA Leave

Deductions caused by exempt employee's unpaid leave under the Family and Medical Leave Act. Can be in increments less than one day, but deductions must be proportionate to actual time out on FMLA leave. 29 C.F.R. §541.602 (b)(7). Please **Note**: This type of deduction for unpaid leave ONLY applies to leave taken under the FMLA. Not any other state or federal leave law or requirement, such as leave granted as a reasonable accommodation under the Americans with Disabilities Act.

C. Deduction Restrictions Do Not Apply to Certain Exempt Employees

Employees exempt from the salary basis test are not covered by the deduction limitations. This would include doctors, lawyers, teachers, teachers, certain computer workers paid at least $27.63 per hour, and certain motion picture workers.

D. Additional Compensation to Exempt Employees

Under the old regulations, additional compensation to exempt employees was permitted. However, some courts, including Courts in the Third Circuit, determined that if such extra compensation was paid on an hourly basis, such as voluntarily paying an exempt employee for each hour worked over 40 hours some extra compensation in addition to his salary, an employee

would lose his exemption. The new regulations in 2004 clarified that as long as the employee is paid a guaranteed salary of at least $455/$684 per week, he may be paid extra compensation based on sales, profits, commissions or "hours worked beyond the normal workweek." Extra compensation "may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off." 29 C.F.R. §541.604

V. Safe Harbor Rule For Salary Basis Test Violations

A. Rule Before 2004

Prior to 2004, the Department of Labor used the Window of Correction Rule, where an exempt employee's pay could not be "subject to reduction" based on the quality or quantity of their work in any week in which they perform any work. "Subject to reduction" meant that the employer has a policy that creates a significant likelihood of such a deduction or actual practice of making such deductions. *Auer v. Robbins*, 519 U.S. 452 (1997). No window of correction was allowed if an impermissible deduction was made due to lack of work. The exemption would have been lost for the employee for the entire period when such deductions were being made. And, if the impermissible deduction were made inadvertently or due to reasons other than lack of work, an employer could correct the mistake by reimbursing the employee and promising to comply in the future. As a result, the window of correction was tricky to obtain. Further, some courts held that the loss of exemption could be for an entire group of exempt employees in the same job title, even those who had suffered no deduction.

B. 2004 Regulation – Effect of Improper Deductions and "Safe Harbor" Rule

After 2004, the new standard significantly more forgiving than the old "window of correction" standard. White-collar exemption is only lost if "facts demonstrate that the employer did not intend to pay the employees on a salary basis." 29 C.F.R. §541.603(a). An actual practice of making deductions will cause loss of deduction. The exemption will not be lost if the impermissible pay deduction(s) were "isolated" or "inadvertent" and if the employee is reimbursed. 29 C.F.R. §541.603. Whether a deduction(s) is deemed "isolated" decided on a case-by-case basis. Factors will include:

- The number of improper deductions;
- The time period during which the improper deductions were made;
- The number and geographic location of the affected employees;
- The number and location of the managers who were responsible for the impermissible deductions; and
- Whether the employer has a "clearly communicated policy permitting or prohibiting improper deductions."

To take advantage of the safe harbor provision, an employer must demonstrate a good-faith effort to comply with the FLSA by: (1) Having a "clearly communicated policy" that prohibits improper pay deductions; (2) Having a mechanism to handle employee wage and hour

complaints; (3) Reimbursing the worker for the improper deduction(s); and (4) Making a good-faith commitment to comply with the act in the future.

Action Point: Employers should demonstrate a "clearly communicated policy" by insuring that you have a posted policy or a policy in your handbook which states that the employer intends to pay its employees on a salary basis and will not make improper deductions, along with a complaint and remediation procedure. In addition, employers should demonstrate "good faith commitment" if a violation occurs by taking action such as republishing or distributing your deductions policy, posting a notice of the employer's commitment to comply on the company bulletin board and/or ensuring that the manager who made the improper deduction is properly trained to ensure that further improper deductions will not be made.

The safe harbor rule is not available to employers that "willfully violate the policy by continuing to make improper deductions after receiving employee complaints." 29 C.F.R. §541.603(a). Under this rule, the loss of exemption limited to the following: (29 C.F.R. §541.603(b)).

- Only during the time period during which the improper deductions were made;
- Only for employees "in the same job classification;" and
- Only for those employees who work for the "same manager responsible for the actual improper deductions."

VI. "Blue Collar" Workers and "First Responders" Not Eligible for Exemption

Regulations make clear that certain employees are not intended to be considered exempt under any of the "white collar" exemptions. According to the regulations, first responders, such as police officers, detectives, investigators, inspectors, park rangers fire fighters, paramedics, EMTs, rescue workers and other similar employees "regardless of rank or pay level," who perform first response work such as preventing or controlling fires, preventing or detecting crimes, conducting investigations or inspections for violations of the law, preparing investigative reports or other similar work, DO NOT QUALIFY FOR AN EXEMPTION because primary duty is not exempt work. 29 C.F.R. §541.3(b). So, employers should be very careful if you seek to apply an exemption to such an employee.

VII. Commissions and Bonuses

A. Commissions

Commissions are payments for hours worked and must be included in the regular rate regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It does not matter that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal pay day or pay period. The employer must include this payment in the employee's regular rate. 29 C.F.R. §778.117.

As far commissions paid weekly, the commission amounts are simply added to the employee's other earnings for that workweek, and the total is divided by the total number of

hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek. 29 C.F.R. §778.118.

For commissions paid at intervals greater than the pay period, the employer may ignore the commission in computing the regular hourly rate until the amount of commission can be ascertained. Overtime must still be paid at a rate not less than one and one-half times the hourly rate paid the employee, only the effect of the commission is ignored temporarily. 29 C.F.R. §778.119. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional overtime compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned. Additional compensation must be paid equaling one half the increase in the regular rate due to the inclusion of the commission multiplied by the number of hours worked.

B. Bonuses

Performance based bonuses must be included in calculating an employee's "regular rate." 29 C.F.R. §778.208. The following "bonuses" or premiums are not included in calculating "regular rate":

(a) Discretionary bonuses; 29 C.F.R. §778.201.

(b) Sums paid as gifts; cash bonuses made at Christmas time or other special occasion, as a reward for service, but not dependent on hours worked, production, or efficiency. 29 C.F.R. §778.212.

NOTE: If the payment is large and employees have grown to

expect it, the bonus may not be considered a gift, but wages. Also, if the bonus is contractual, it is wages.

(c) Show up or reporting pay "bonus" to the extent pay exceeded hours worked; 29 C.F.R. §778.220.

(d) Payments for accrued compensatory time; 29 C.F.R. §553.26(c).

(e) Premium rates for hours in excess of daily or weekly standard. N.J.A.C. 12:56-6.6; 29 U.S.C. §207(e)(5); 29 C.F.R. §778.202.

Premium pay for weekend work or special days and Clock Pattern Premium pay. 29 U.S.C. §207(e)(6) and (7); 29 C.F.R. §778.203 and 204.

VIII. FMLA CLAIMS

A. Introduction

Employers with employees out on leave due to work related injuries must comply with state workers' compensation laws. It is not sufficient to simply comply with such laws or to blindly follow the advice of the claims manager for the workers' compensation carrier, who may only be considering your company's obligations under the workers' compensation statute.

Important to understand that there are state and federal statutes which may also cover injured employees and may offer significantly more protection than the state workers' compensation law.

In addition to worker's compensation law, employers must follow:

FMLA

NJLFA (New Jersey Family Leave Act)

ADA

NJLAD (New Jersey Law Against Discrimination)

USERRA

Focus of this discussion will be to make sure that you are adequately familiar with the FMLA, ADA, NJLAD and USERRA to navigate the maze when you are dealing with workers compensation claimants. Much of what we talk about will be equally applicable to employees who have non-work related injuries or illnesses.

IX. OVERVIEW OF KEY APPLICABLE LAWS

A. The Federal Family and Medical Leave Act of 1993 ("FMLA")

What is the difference between FMLA and Workers Compensation? Workers compensation is a form of income insurance. **It is not a form of leave.** Workers compensation does not even require that you give an employee any leave or that you return them to work. The only thing that the workers compensation statute says you can't do is discriminate against because he or she claims comp benefits. So, whenever an employee is out for a work related injury, you must consider whether they are also eligible for FMLA leave. This should be done right away! This helps your company. Otherwise you can be in the position of having the employee save the FMLA time when it could otherwise be running.

Covered employers are employers who employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. The definition of "employ" is very broad and is taken from the Fair Labor Standards Act. Essentially, anyone on the employer's payroll is considered to be an employee. This would include part-time employees and employees on paid or unpaid leave, so long as the employer has a reasonable expectation that the employee will later return to active employment.

(1) Eligible employees:

Employees at work sites with 50 or more employees within 75 miles of that work site. Employees eligible for leave benefits are those who have been employed for at least 12 months (the employment need not be continuous) and have worked at least 1,250 hours for the employer

within the previous 12 month period. Public agencies and private and public elementary and secondary schools are covered without regard to number of employees.

(2) Leave benefits

Eligible employees are entitled to 12 work weeks of leave in any 12 month period due to (1) the employee's own "serious health condition"; (2) birth of a child, adoption or placement for foster care; and (3) in order to care for a spouse, child or parent with a serious health condition. Since we are talking about workers compensation, we will focus in on the employee's own serious health conditions.

"Serious health condition" means an "illness, injury, impairment, or physical or mental condition" which includes any of the following: In-patient care OR Continuing treatment by a health care provider which involves one or more of the following: (1) a period of incapacity (inability to attend work, school etc.) for more than three consecutive calendar days, that also involves (a) treatment two or more times by a health care provider; OR (b) treatment by a health care provider on at least one occasion which results in a regimen of continued treatment. Treatment includes prescription drugs such as antibiotics; (2) conditions not currently incapacitating but which require multiple treatments qualify as serious health conditions, e.g., chemotherapy or dialysis. (3) any period of incapacity or treatment for such incapacity due to chronic serious health condition. (4) a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective.

Overall, this definition is broad. Many workers will be able to claim protection of FMLA for their own conditions or the conditions of their covered relatives. Most employees whose

workers' compensation treating physician puts them out on leave will be qualified for FMLA leave. You may even accept the workers' compensation physician's note in lieu of a normal medical certification.

There are certain exclusions. "Continuing treatment" does not include a regimen of over-the-counter medications, bed rest, etc. that can be started without a visit to a healthcare provider. Common cold, flu, upset stomach and routine dental problems do not qualify as serious health conditions.

(3) Full-time, Intermittent and Reduced Leave

Leave may be taken in consecutive, full work weeks. Leave may be taken on a reduced leave (part-time) schedule or intermittently when medically necessary. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. Minimum block is shortest period employer uses for payroll purposes, but cannot be more than one hour. Reduced leave schedule is a leave schedule that reduces an employee's usual number of hours per work week or per work day.

Where leave is needed for planned medical treatment, the employee must make an effort to schedule the treatment so as not to "disrupt unduly" the operations of the employer. The employer may require an employee requesting intermittent or reduced leave to transfer temporarily to an available alternative position with equivalent pay and benefits and which better accommodates the leave needs of the employee. Further, transfer to an alternative position must comply with any applicable collective bargaining agreement, the ADA and the NJLAD. Also,

modification of an employee's job (including reassignment of certain duties) may qualify as a temporary transfer.

(4) Restoration

Under the FMLA, restoration of the employee to his/her prior position or its equivalent with no loss of benefits required. Equivalent means virtually identical! However, restoration is not required where position is eliminated as part of a bona fide reduction in force. Also, an employee on FMLA leave gets no greater protection than the employee would have had if they had remained working. You would need adequate proof to overcome possible inference of retaliation.

Restoration may be denied to certain key, highly compensated employees. Such employees must be informed **at the time they request leave** that they are classified as "key" employees and that job restoration may be denied to them. A "Key" employee is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

(5) Benefits during leave

Health benefits must be extended and continued during FMLA leave. An employee must continue to pay any amounts he or she paid prior to leave. REMEMBER, ONCE FMLA IS OVER, YOU DO NOT NEED TO CONTINUE PAID BENEFITS, EVEN IF EMPLOYEE IS ON WC LEAVE.

(6) Notice

Federal regulations require an employee give advance notice of at least 30 days, or, where not practicable, provide reasonable notice. Employee does not need to request FMLA leave – only needs to tell you they need time off for a reason which could be a serious health condition. If you know that employee was injured at work and that is why they need time off, that is sufficient to trigger the employer's obligations under the FMLA. YOU ARE ON NOTICE IF YOU HAVE REASON TO BELIEVE THAT THE FMLA MAY BE IMPLICATED.

As far as notice by the employer, federal regulations require an employer give its employees notice of their rights and obligations under the act. IF YOU HAVE A POLICY MANUAL, IT SHOULD CONTAIN FMLA POLICY. It used to be that if the employer failed to designate leave as FMLA leave, it couldn't be retroactively counted as such. In Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002) the Supreme Court found that the Secretary of Labor exceeded his discretion by enacting this regulation. Ragsdale calls into question case law and regulations which state that leave cannot be retroactively designated. However, it is best not to retroactively designate leave because where the retroactive designation could be found to have prejudiced the employee, it may be rejected. DOL HAS NOT YET REVISED ITS REGULATIONS - NOT CLEAR IF THEY ARE GOING TO EMBRACE IT TOTALLY. It is best, where possible, to designate leave as FMLA leave within two days of receiving notice of the need and reason for leave.

B. New Jersey Family Leave Act

New Jersey's Leave Act is similar to, but not fully consistent with the FMLA. The key differences are:

- NJFLA applies to employers with 30 or more employees
- NJFLA reasons for leave do NOT include leave for an employee's own medical condition.

C. Americans With Disabilities Act of 1990 ("ADA")

1. Background

The ADA prohibits employers from discriminating against "a qualified individual with a disability" with respect to hiring, firing, and other employment decisions. The ADA requires reasonable accommodation. Under the ADA, "disability" means:

(a) A physical or mental impairment that substantially limits one or more of the "major life activities" of an individual; or

(b) Having a record of such impairment; or

(c) Being regarded as having such an impairment.

Under Workers Compensation laws, an individual awarded permanent partial disability under the workers' compensation law may be a protected individual if he or she can perform essential functions of job **with reasonable accommodation.** The EEOC's recent Enforcement Guidance on Workers' Compensation and the ADA gives some helpful information with respect to an injured employee. The EEOC states that not every employee who is injured on the job and entitled to workers' compensation benefits will meet the criteria for disability under the ADA.

An award of workers' compensation benefits or the assignment of a substantial disability rating does not automatically trigger protection under the ADA. Similarly, not every employee who has filed a workers' compensation claim has "a record of" a disability, and not every employee who is injured at work is "regarded as" having a disability. It is important to remember that under the ADA, temporary injuries, such as a broken leg, are not generally considered to be a disability.

2. Reasonable Accommodation

The ADA protects any individual with a disability who, with or without "reasonable accommodation," can perform the essential functions of the employment position held or desired. 42 U.S.C. §12111(8). An employer is required to make "reasonable accommodation" to the known physical or mental disabilities of an otherwise qualified individual unless to do so would impose an "undue burden" upon the entity. 42 U.S.C. §12112(b)(5)(A). A reasonable accommodation may include:

(a) Making existing facilities used by employees readily accessible to the disabled.

(b) Job restructuring, flexible work schedules, reassignments to vacant positions, acquisition or modification of equipment. 42 U.S.C. §12111(9).

(c) Paid or unpaid medical leave.

The FMLA's 12 week limit is not necessarily sufficient. At conclusion of FMLA leave, you must consider whether an employee is disabled (or handicapped under the NJLAD). **Indefinite leave** is not considered to be reasonable. The fact that the doctor can't give a definite date for return does not make it indefinite. It may be 6 to 9 months total. The EEOC requires employers and employees to engage in an "interactive process", to determine what the appropriate accommodation may be, if any.

3. Undue Hardship

No accommodation is required under the ADA where such would result in "undue hardship" to the employer. But, this is more than inconvenient or expensive. It must actually jeopardize the employer's ability to run its business. To determine undue hardship, the following are considered: (1) the overall size of the employer (including number of employees, number and types of facilities, and the size of its budget); (2) the type of operation maintained by the employer, including the composition and structure of the workforce; and (3) the nature and cost of the accommodation. 42 U.S.C. §12111(10). The bigger a company is, the more difficult it is to establish undue hardship. Cost is usually the worst argument!

D. New Jersey Law Against Discrimination ("NJLAD")

This law contains many provisions similar to ADA. Under NJLAD, N.J.S.A. 10:5-1, et seq., it is unlawful to discriminate against an employee, in hiring, employment or termination, because of that employee's "handicap." NJLAD applies to all New Jersey public and private employers. As with ADA, NJLAD also requires reasonable accommodations.

E. WORKERS COMPENSATION LAW

1. General Provisions

The law provides that compensation be paid to employees whose injuries or illnesses arise out of and in the course of employment, without regard to employer negligence or employee fault (except limited circumstances.) WC is the exclusive remedy for actions by an employee against his or her employer and/or co-workers based upon injuries arising out of the workplace. Bars only suits based on negligent injury.

2. Anti-Retaliation Provisions

It is unlawful for any employer to discharge or take other adverse action against an employee in the terms and conditions of his employment because the employee has claimed or attempted to claim compensation benefits or because the employee testified, or will testify, in any workers compensation proceeding.

3. Leave

Workers' Compensation is not a form of leave. Holding job open not required (but watch out for claims of retaliation.) Remember that FMLA, ADA and HPEPA still apply, so you must insure that you are not violating any of these laws in terminating an employee on leave.

X. OBTAINING THE NECESSARY MEDICAL INFORMATION TO CONFIRM THE LEGITIMACY OF THE EMPLOYEE'S CONDITION

A. Medical certification prior to taking leave

Under the ADA, you only need to accommodate disabilities you know about. Employer may require medical certification in order to substantiate an accommodation request. Medical

inquiries or exams must be job related and consistent with business necessity. This means the employer has a reasonable belief that (a) an employee will be unable to perform the essential functions his or her job because of a medical condition; or, (b) the employee will pose a direct threat because of a medical condition.

An employer may insist that an employee see its own doctor in two situations. First, if the employee's documentation is lacking when requesting accommodation, the employer can insist the employee see his or her own doctor. Before you do that, however, try to get clarification from the employee's doctor. Second, if the employer reasonably believes the employee poses a direct threat to himself or to others, it can require the employee to be seen by a doctor it selects. Be careful and make sure your doctor is better than the employee's!

Under the FMLA, employers may require that employees submit medical certification of the alleged "serious health conditions." 29 C.F.R. §825.305. An employer may require the health care provider to furnish a certification relatively detailed information about the condition and whether it qualifies as a serious health condition, such as the date of onset and probable duration of incapacity, whether intermittent leave is necessary, the schedule and description of additional treatments, and the names of other health care providers who will be treating the employee.

All employers should provide and discuss Form WH-380 with the employee. You may request that employees submit such documentation in 15 days. If you doubt certification, you can get a second and third opinions, at employer's expense. The third is binding.

B. Medical certification prior to return to work.

Under the ADA, the employer may request a fitness-for-duty medical certification where such is job related and consistent with business necessity. This means you cannot request a medical certification where the condition for which the employee was on leave does not have any apparent impact on their ability to perform their job.

Under the FMLA, you may obtain a Fitness for Duty Certification, where the employee is out for own serious health condition, before recommencing active employment*, if that is part of a uniformly applied policy.* Where such a uniform policy is applied, the employee's restoration to work may be deferred if and when the employee fails to submit such a certification. 29 C.F.R. § 825.310(f). Remember, a Fitness for Duty Certification must comply with the ADA. Therefore, it must be job related and consistent with business necessity. Fitness for Duty Certifications may only inquire as to the condition for which leave was taken, not other conditions. An employer can seek clarification, but it cannot contest the fitness-for-duty certification. NOTE: ONCE THE EMPLOYEE RETURNS, IF YOU HAVE A REASONABLE BELIEF THAT EMPLOYEE CANNOT DO THE ESSENTIAL FUNCTIONS OF HIS JOB, YOU COULD REQUEST MORE INFORMATION OR EVEN AN EXAM FROM YOUR OWN PHYSICIAN.

C. Beware of Privacy Issues.

An employee's medical information must be treated with the utmost confidentiality. Access must be restricted to only those who **"need to know."** Medical information should be kept in a separate file, segregated from the personnel file and protected from casual or

unauthorized access. Limiting access to medical information also makes it easier to argue that disability was not known to decision makers. It's also important to keep in mind that in most instances, medical opinions are not rendered in a vacuum, especially when it comes to the ADA and workers' compensation. **The importance of an accurate, up-to-the minute job description cannot be overstated.** Treating physicians should review an employee's job description prior to issuing medical opinions.

D. The ADA and Medical Documentation

Employers need to be especially careful when it comes to requesting and or collecting medical information on an employee who is protected under the ADA. If you focus too much on an employee's medical condition, you can be accused of "perceiving" a disability. SOMETIMES YOU JUST DON'T WANT TO KNOW. BEFORE ASKING FOR MEDICAL INFORMATION, THINK ABOUT WHAT YOU ARE GOING TO DO WITH IT. WILL IT HELP YOU OR HINDER YOU IN YOUR GOALS. REMEMBER, YOU DON'T HAVE TO ACCOMMODATE DISABILITIES YOU DON'T KNOW ABOUT.

If the employee says he or she can do the job, you should probably accept that unless or until you have reason to question it. You need not ignore clear physical or mental symptoms. If an employee is encountering difficulties on the job or you have a legitimate business interest in knowing medical details, you may proceed. The question you are trying to answer is whether he or she can perform the "essential functions" of the job with or without accommodation? This will involve a review of the job description and in many instances will entail obtaining a medical

opinion on the nature of the person's medical condition--i.e., cannot lift more than 10 pounds, or cannot stand for more than 15 minutes.

XI. *LIGHT DUTY PROGRAMS*

A. Define The Term.

Law does not require the institution of a "make work" light duty program or the creation of new, light duty jobs. However, the ADA does require: (1) Reassignment of marginal (non-essential) job functions; and (2) Reasonable accommodation to assist employee in performing essential job functions.

B. Requiring participation in light duty program.

Benefits under both workers compensation will be cut off if an employee is offered a light duty position but elects FMLA leave instead. In many cases, this may effectively work to require an employee to return to light duty instead of taking FMLA leave. However, an employee may elect to receive unused sick and vacation time during FMLA leave once workers comp is stopped. Under the FMLA, where light duty involves only a reassignment or modification of marginal/non-essential tasks, the employer may require an employee to accept the reassignment/modification rather than taking FMLA leave. However, where an employee cannot perform one or more essential functions of a job, the employee has an absolute right to take FMLA leave (assuming employee eligibility) rather than participate in the employer's light duty program. REMEMBER, DON'T BE TOO EAGER TO SAY A JOB FUNCTION ISN'T ESSENTIAL TO DENY LEAVE – YOU MAY GET STUCK WITH THAT POSITION LATER WHEN THE EMPLOYEE WANTS IT PERMANENTLY REMOVED AS AN

ACCOMMODATION! And, bear in mind that the alternative position must have equivalent pay and benefits

Under the ADA, where an employee's FMLA leave allotment is exhausted or the FMLA does not apply, the employer may require participation in a light duty program under the ADA. Leave, under ADA, is not the preferred accommodation.

How to Handle Top Employment Claims: Tips From the Experts

Submitted by Peter L. Frattarelli

Peter L. Frattarelli
Member of New Jersey, Pennsylvania and Delaware Bars
pfrattarelli@archerlaw.com
856-354-3012 Direct
856-795-0574 Direct Fax

Archer & Greiner, P.C.
One Centennial Square
Haddonfield, NJ 08033
856-795-2121 Main
856-795-0574 Fax
www.archerlaw.com

WORKPLACE DISPUTES: FROM ADMINISTRATIVE REVIEW TO TRIAL

By: Peter L. Frattarelli

National Business Institute

Atlantic City, New Jersey

THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.

I. AVOIDING WRONGFUL DISCHARGE CLAIMS

A. EMPLOYMENT LAWS YOU NEED TO KNOW ABOUT

Employers face a myriad of labor and employment laws and regulations that present an alphabet soup of problems and pitfalls for employers. Legal roadblocks are presented from the Federal and State sector, ranging from when an employee first applies for a job until after discharge or resignation. In this seminar, we will attempt to present to you a guideline of the employment law landscape to properly counsel your clients in addressing these numerous laws, regulations and case decisions.

As we go through the seminar today, we will touch on many Federal and State laws. But, as an overall guide, below is just a partial list of the employment laws that New Jersey employers must be cognizant of when employees are discharged:

- The Federal Family and Medical Leave Act;
- Title VII of the Civil Rights Act of 1964, as amended;
- The Civil Rights Act of 1991;
- Sections 1981 through 1988 of Title 42 of the United States Code, as amended;
- The Employee Retirement Income Security Act of 1974, as amended;
- The Immigration Reform and Control Act, as amended;
- The Americans with Disabilities Act of 1990, as amended;
- The Age Discrimination in Employment Act of 1967, as amended;
- The Workers Adjustment and Retraining Notification Act, as amended;
- The Occupational Safety and Health Act, as amended;

- The National Labor Relations Act;
- The Federal Fair Labor Standards Act, as amended;
- The Federal Equal Pay Act, as amended;
- The Federal False Claims Act;
- New Jersey Law Against Discrimination ("NJLAD");
- New Jersey Conscientious Employee Protection Act ("CEPA");
- New Jersey Family Leave Law ("NJFLA").

B. LEGAL MATTERS TO CONSIDER BEFORE TERMINATION

In New Jersey, as with most states, employment is generally considered to be "at will." Simply stated, this means that employees can be disciplined or terminated for any reason, or no reason at all, as long as it is not prohibited by statute or certain common law exceptions. The following is a list of some of the statutory exceptions:

- Civil Rights Law, Section 1981– discrimination on the basis of race;
- Civil Rights Law, Title VII – discrimination on the basis of sex, race, religion, color, national origin and pregnancy (through the Pregnancy Discrimination Act);
- ADA – discrimination on the basis of a disability;
- ADEA - discrimination on the basis of age;
- Equal Pay Act - discrimination on the basis of gender with respect to wages;
- National Labor Relations Act – discrimination against employees exercising union and/or collective bargaining rights;

- Anti-retaliation protections exist in almost every employment law statute, to protect employees who invoke the benefits of these statutes;

- Whistleblower protection also exists in many federal and state statutes, including OSHA, the FLSA, and the Sarbane-Oxley Act (the post-Enron law);

- New Jersey's NJLAD and CEPA provide similar and overlapping protection for many of these protected classes.

Under the common law, other exceptions to the employment "at will" doctrine also exist:

- Employees with an express contract;

- Employees with an implied contract, either through conduct, practice or an employee handbook;

- Union collective bargaining agreement;

- Implied covenant of good faith and fair dealing, which is a part of every employment contract, whether express or implied;

- Public policy exception.

The "public policy" exception has been the subject of numerous cases over the past decade. Initially viewed as a limited exception, this doctrine has gained acceptance nationwide and in New Jersey, to protect employees who are subject to adverse employment actions for exercising rights that are of special important to the public interest. The first wave of cases limited the public policy exception to incidents other than employment discrimination based on a protected class:

Heller v. Dover Warehouse Market, Inc., 515 A.2d 178 (Del. Super. 1986) – employee allegedly discharged for failing a polygraph test had a valid cause of action for wrongful

discharge even though he was an at-will employee. The Court relied heavily on New Jersey's anti-polygraph statute which prohibited employers from giving lie detector tests to employees.

Henze v. Alloy Surfaces Co., C.A. No. 91C-06-20 (Del. Super., Mar. 16, 1992) – employee allegedly discharged for refusing to overcharge the federal government for his employer's products had a valid cause of action for wrongful discharge in violation of public policy.

Lord v. Souder, 748 A.2d 393 (Del. 2000) – New Jersey Supreme Court expressly acknowledges that violation of public policy is one of the established exceptions to employment at-will, in New Jersey.

Thereafter, the New Jersey Supreme Court even extended public policy violation claims to persons who are otherwise within protected classes under anti-discrimination laws. In Schuster v. Derocili, 775 A.2d 1029 (Del. 2001), the Court recognized for the first time a cause of action, under the implied covenant of good faith and fair dealing, for an alleged termination based upon a refusal to accede to a supervisor's sexual advances. Even though this is clearly governed by Title VII, and New Jersey's administrative scheme established under FEPA, the Court permitted this common law claim to survive. The Court relied upon the overall public interest served by New Jersey's and Federal anti-harassment laws. Although case law since Schuster has not yet expanded the doctrine to other employment classes or laws, the rationale of Schuster would apply to any type of protected class, such as age, race or disability. This imposes the potential for common law claims, with potentially unlimited damages, independent of New Jersey's administrative scheme.

Employers can best protect themselves from wrongful discharge by establishing proper policies or procedures, such as by implementing a handbook. If you choose to provide a handbook, the most common question is: what provisions it should contain?

Generally, every employer should have a handbook or policy manual in place. Handbooks allow an employer the opportunity to communicate necessary information to

employees and in order to offer the employer some protection from potential lawsuits, it is absolutely essential that certain information be published and distributed to employees. However, employers must exercise caution in implementing handbooks and applying policies. Policies should be consistently and neutrally applied to avoid claims of discrimination and favoritism.

The first critical step in implementing an employee handbook is to include a clear and prominent disclaimer that employment is "at-will" in order to avoid the creation of an express or implied employment contract. It is recommended that employers place only the disclaimer on a separate page at the very front of their handbook, i.e., directly behind the cover page, in front of the Index. Finally, employers should highlight the disclaimer by formatting it differently from the remainder of the text by using boldface type, uppercase letters, a border, or the like, with a heading likely to attract an employee's attention.

Employers should also make it a practice to have employees execute an Acknowledgment form indicating that each employee has received the handbook and has been alerted to their at-will status. Courts have found that an implied contract created by a handbook that included a valid disclaimer, based on the fact that a *prior* handbook did not contain such a disclaimer and employees were not made aware of the change. Furthermore, having employees execute such an acknowledgment protects against arguments that employees were not aware of the policies contained within the handbook and specifically, the policy governing employment-at-will.

A handbook, at bare minimum, should contain an at-will disclaimer, an equal employment opportunity policy, a family and medical leave policy (for employers with more than fifty employees), a workplace harassment policy, an e-mail/computer policy (for those employers who allow employees access to their computer systems), a no solicitation/no distribution policy, a description of benefits, a benefits disclaimer, a policy describing an employee's rights to continuation coverage under COBRA (for employers with more than twenty employees), and a notice of an employee's HIPAA privacy rights. These are each addressed below:

1. EQUAL EMPLOYMENT OPPORTUNITY POLICY

Every handbook should contain a policy acknowledging the employer's obligation to treat all applicants and employees equally with respect to the terms and conditions of employment regardless of their membership in any of the protected classifications. This policy should not overstate an employer's obligations and should retain the employer's right to consider protected classifications where they constitute a bona fide occupational qualification.

2. FAMILY AND MEDICAL LEAVE ACT

Every handbook for employers of more than fifty (50) employees should contain policies addressing these leave laws and outlining an employee's rights under these laws. The federal Family and Medical Leave Act ("FMLA"), 29 U.S.C. §2601, et seq., entitles certain employees to an unpaid leave of absence, for up to twelve (12) weeks in any twelve (12) month period, for the birth, adoption or foster placement of a child, or the serious health condition of the employee or a family member (i.e., child, parent, or spouse). The FMLA covers employers with 50 or more employees on the payroll for each working day during 20 or more calendar weeks in the current or preceding calendar year.

The United States Department of Labor ("USDOL") has cautioned employers that failure to provide proper notice of employee responsibilities under the FMLA will preclude the employer from "tak[ing] action against an employee for failure to comply with any provisions required to be set forth in the notice." 29 C.F.R. § 825.301(f). To that end, the USDOL has indicated that employers must notify their employees on the following subjects:

- that leave will be counted against the employee's annual FMLA leave entitlement;
- of the requirements of furnishing a medical certification and penalties for failure to do so;

- of the employer's requirement that the employee use paid leave; and that the employee has a right to substitute paid leave;
- of the employer's requirement that the employee make premium payments to maintain health benefits and of the arrangements for making such payments and the possible consequences for failure to pay premium;
- of the employer's requirement that the employee obtain a fitness-for-duty certificate;
- of the employee's status as a "key employee" and the possibility of non-restoration because of that status;
- of the employee's right to restoration to employment after leave;
- of the employee's liability for the employer's health care benefit premium portion if the employee does not return to work following leave. 29 C.F.R. § 825.301(b)(1).

Employers who are not covered by the above-referenced leave laws may wish to consider the inclusion of an extended medical leave policy within their handbook. Employers should be aware that the disability protection laws require that an employer provide reasonable accommodations to qualified individuals with disabilities/handicaps. Reasonable accommodations may include temporary leaves of absence from work. Thus, even for smaller employers who are not subject to the above-referenced requirements or for employees who are considered "eligible" for leave under the statue, the employer may be obligated to provide a temporary leave from work.

A policy outlining the general parameters of such a leave may be advisable. For example, the policy should explain that the employee's benefits will cease during the leave period but may be continued through COBRA and that while the employer will attempt to

reinstate the employee to a similar position with like pay and benefits, such reinstatement will depend upon business and staffing needs.

3. WORKPLACE HARASSMENT

To avoid liability for claims of harassment in the workplace, an employer must implement a policy addressing all forms of prohibited discrimination and harassment based on the various legally protected classifications. A strong, comprehensive anti-harassment policy, including an effective complaint remediation procedure, is an employer's best defense against harassment suits. The United States Supreme Court's rulings on employer responsibility for harassment make it clear that in order to avoid liability for harassment, an employer must have in place a known and viable internal complaint procedure for employees to make harassment complaints. Although these cases dealt with the issue of sexual harassment, the same analysis will apply to harassment complaints related to other protected classifications, such as race and religion. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 77 FEP 14 (U.S. Fla., June 26, 1998); Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 77 FEP 1 (U.S. Ill., June 26, 1998).

Where no tangible employment action is taken, an employer may raise an affirmative defense consisting of two elements:

- The employer exercised *reasonable care* to prevent and correct promptly any sexually harassing behavior; and
- The employee *unreasonably* failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.
- Under Ellerth/Faragher, an employer that has an effective anti-harassment policy and takes appropriate corrective action in response to a legitimate complaint will still be strictly liable in cases involving a tangible employment action. As a practical matter, prompt remedial action will reduce the amount of plaintiff's damages and may eliminate plaintiff's incentive to sue in the first place.

Employees must be pro-active in preventing and responding to harassment in the workplace in order to avoid liability. It is imperative that every employer have a strong policy against all illegal harassment, including sexual harassment, that is clearly and regularly communicated to employees and effectively implemented. This policy should be in writing and include at least the following:

- A definition of sexual and other harassment and examples of the types of conduct that constitute objectionable harassment, including, but not limited to, unwelcome sexual advances, suggestive or lewd remarks, suggestive or lewd jokes, and unwanted touches.

- An explicit statement that harassment is strictly prohibited and violators will be subject to discipline which may include immediate termination.

- An effective and accessible complaint procedure designed to encourage those who have been subjected to harassment to come forward.

- A policy that those who report such misconduct will not be subject to retaliation.

- A policy of prompt and efficient investigation of all reports of misconduct.

- Appropriate confidentiality safeguards.

- Special situations should be covered: (1) Harassment by third parties (vendors, patients, suppliers, guests, patrons, etc.); (2) Satellite offices -- 800 numbers, beeper numbers, access to those who could take effective action

- Mere "Paper" is not enough. The policy must be widely disseminated. All complaints must be investigated promptly and thoroughly and effective remedial action, designed to end the harassment, must follow any investigation which substantiates a complaint.

4. E-MAIL AND WORKPLACE PRIVACY ISSUES

The near universal use of computers and e-mails in the workplace has begun to generate privacy-related litigation. Although review of computer files and employee e-mail may raise privacy issues, statutory and case law to date has recognized the importance of employer control over the workplace. Courts generally seek to balance an employer's need to review the information against the employee's reasonable expectation of privacy.

Federal and State Statutory Law: The federal Electronic Communications Privacy Act ("ECPA") protects all electronic communications transmitted by wire, radio, electromagnetic, photoelectric, or photo-optic systems. As such, interception of e-mail, telephone calls and similar communications is prohibited.

The ECPA incorporates two exceptions relevant to employer monitoring of e-mail communications: (1) it exempts systems providers from liability for intercepting, disclosing or using that communication if necessary to provide services, and (2) it exempts a service provider from liability if a party to the communication consents to an interception, disclosure or use.

- Employers may take advantage of both of these exceptions (as systems providers) and by requiring employee written consent to e-mail monitoring.

- While oral consent has been held to be valid, because of the dearth of case law interpreting the subject, written consent is advisable. Thus, employers should promulgate a policy governing the use of computers/e-mail and obtain an employee's consent to the employer's access of same.

- The policy should explain that the computer system is the property of the employer and specifically disclaim any alleged right of privacy in the employee's use of the system.

- The policy should also explain conduct prohibited while using the employer's computer system, such as harassment, defamation, solicitation, or disclosure of confidential information.

- The policy should also explicitly reserve the right of the employer to access and delete e-mails and other items stored on the computer.

- Despite the existence of such a policy, an employer should still exercise great caution when considering reviewing employee e-mail.

5. HIPAA POLICY

Recent regulations enacted under HIPAA (the Health Insurance Portability and Accountability Act) require that certain covered entities take steps to ensure the privacy of individuals' protected health information. Although employers are not "covered entities," they are required to ensure that medical and other health information of employees is protected and not used in employment decisions. Thus, all employment manuals of employers that sponsor a group health plan or provide medical care to their employees should contain a policy guaranteeing the confidentiality of protected health information.

That policy should set forth an employer's obligations under HIPAA, which include accessing protected health information only as authorized by law or the employee, should contain an anti-retaliation provision for employees exercising HIPAA rights, and should specifically ensure that protected health information will not be taken into consideration in employment decisions.

6. BENEFITS SUMMARY

Employment manuals should contain a brief summary of benefits offered to employees. These benefits will differ depending upon the type and size of the employer. However, some examples of such benefits are vacation pay or other paid time off banks and health and other types of insurance. A handbook should not attempt to describe the particulars of insurance-type

benefits. The handbook should simply explain the availability of a certain type of insurance, set forth general parameters of eligibility, and allow plan documents to speak for themselves.

Some of the required elements are discussed below.

Every handbook should explain the availability of Workers' compensation for work-related injuries and explain the importance of immediately reporting any such injuries to assure coverage through Workers' compensation.

In light of the ever-increasing amount of litigation over benefits issues, where an employee handbook references employee eligibility for benefits, such as health or other types of insurance, a disclaimer reserving the employer's right to modify or discontinue benefit plans should also be included in the handbook.

Employers of over twenty employees, these rights are governed by COBRA, which require employers to advise terminated employees of their right under federal law to purchase continuation of their health insurance for up to eighteen (18) months. At a minimum, these policies should set forth general eligibility requirements and continuation coverage rights and responsibilities.

A non-solicitation/non-distribution policy can be effective in curbing any incipient union organization campaign in the workplace. However, the National Labor Relations Board ("NLRB") has set out strict rules with respect to such policies, and policies which do not comport with the NLRB's requirements will not be effective. Specifically, a valid policy may prohibit solicitations of all types by employees during working time and may prohibit distributions during working time, or at any time in working areas. Moreover, a valid policy may prohibit solicitations and distributions that interfere with other employees' work. However, such policies may not prohibit solicitations/distributions during non-working time and may not subject union literature to a different standard than other types of solicitations and distributions.

With respect to enforcement, managers and supervisors must be aware that even a facially valid no-solicitation rule can violate the National Labor Relations Act if it is enforced in an uneven manner, resulting in discrimination against employees engaged in union activities. See, e.g., Restaurant Corp. of America v. N.L.R.B., 827 F.2d 799 (D.D. Cir. 1987). Please keep in mind that exceptions to this rule, other than few exceptions for charitable causes (for example, solicitations for the United Way, the Girl Scouts, etc.), will render it unenforceable for union activity.

Employee leaves for military training and active duty, and reinstatement therefrom, are governed by the federal Uniformed Services Employment and Redeployment Rights Act, 38 U.S.C. § 4301 *et seq*. ("USERRA"). USERRA's primary benefit to employees is the right to reinstatement to employment upon the termination of a period of military service under certain circumstances. However, USERRA also requires continuation of medical benefits (if any) for thirty days as if the employee remained in active employment and for COBRA-type continuation thereafter. Additionally, the statute provides for accrual of pension and other service benefits during military leave periods.

The provisions of USERRA regarding leave and reemployment rights are relatively detailed and, without duplicating the statute, cannot be addressed comprehensively in a handbook policy. However, in light of current world events, such rights should be at least mentioned in a handbook.

Some policies should be avoided, if possible, in the handbook. Some examples include:

Disciplinary Action: although a policy addressing disciplinary violations can be useful, employers should avoid rigid progressive disciplinary policies which may limit discretion in imposing the appropriate discipline upon employees. In addition, employer should exercise caution in including a listing of offenses in a handbook, in order to preserve maximum discretion for employers.

Confidentiality of Employee's Terms of Employment: employment manuals sometimes contain a provision requiring that employees maintain confidentiality with respect to the terms and conditions of their employment, including their salary and imposing discipline upon employees for violating that policy. Such a policy is unlawful under the National Labor Relations Act. The NLRA strictly forbids the imposition of discipline upon an employee for discussing his or salary with other employees, even among non-exempt employees.

II. WHAT TO DO WHEN AN EMPLOYMENT CLAIM IS FILED

Employers facing an employment claim need to often respond quickly depending on the nature of the "claim." "Claims" often take three forms: (1) attorney or employee demand letter; (2) administrative claim; or (3) lawsuit. The time to respond will of course depend on the circumstances and specifics of the claim. But, regardless of the claim, several initial steps are critical:

- Retain counsel, if only to preserve potential privileges;
- Conduct "initial" investigation of the facts;
- Instruct all witnesses within litigation control group to remain silent;
- Explore possible insurance coverage;
- Assess possibility of amicable settlement, in exchange for release of claims.

III. Pros and Cons for Using Summary Judgment and Adjudication Motions

1. Legal Standards

The legal standards in order for a party to obtain summary judgment is nearly identical between the federal and state court of New Jersey. The overall standard requires that, assuming all of the facts asserted by the opposing party are true, is the party entitled to a jury trial. In other words, is there a fact dispute sufficient to allow the opposing party to present its claims to a jury. Stated another way, is the party moving for summary judgment entitled to a judgment as a matter of law, so that the claims would not proceed towards a jury trial.

The standard for receiving summary judgment in federal court is uniform, nationwide. When a party moves for summary judgment, "[t]he judgment shall be granted forthwith if the pleadings, depositions, answers to interrogatories on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Once the moving party establishes "that there is an absence of evidence to support the non-moving party's case," Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The non-moving party may also not rely on bare assertions, conclusory allegations or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). Rather, the non-moving party must "go beyond the pleadings" and present competent evidence designating "specific facts showing there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324 (internal quotations omitted). To withstand summary judgment, a plaintiff must submit evidence of more than his mere belief and conclusory allegations. See Davis v. Ashcroft, 2002 U.S. Dist. LEXIS 9309 at *51 (D.N.J., March 8, 2002) ("Plaintiff's belief and his conclusory allegations that Defendant discriminated against him are insufficient to withstand Defendant's motion for summary judgment").

The standard for receiving summary judgment under New Jersey state court rules is, again, very similar to federal court. The New Jersey Rules of Civil Procedure state that a court

shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Shelcusky v. Garjulio, 172 N.J. 185, 199 (2002). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court set forth the standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. The Court in Brill clarified the prior standard, in order to "encourage courts not to refrain from granting summary judgment when the proper circumstances present themselves." Brill, 142 N.J. at 541. According to Brill, if there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Brill, 142 N.J. at 540, (citation omitted).

Consequently, while "genuine" issues of material fact preclude the granting of summary judgment, those that are "of an insubstantial nature" do not. Brill, 142 N.J. at 530. The Brill court reviewed three cases from the United States Supreme Court, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and reasoned that read together, these cases adopted a standard that requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 533 (quoting Liberty Lobby, 477 U.S. at 251-52). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Brill, 142 N.J. at 540 (quoting Liberty Lobby, 477 U.S. at 52). This standard comports with the court's admonition that "[t]o send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Id., 142 N.J. at 541.

Accordingly, the court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a neutral factfinder to resolve the alleged dispute in favor of the non-moving party." Zaza

v. Marquess and Nell, Inc., 144 N.J. 34 (1996) (citing Brill, supra). In short, the non-moving party must go beyond the pleadings and, by affidavits, depositions, interrogatory answers and admissions on file, designate specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 323-24. Therefore, summary judgment is properly granted if the papers submitted with the motion palpably demonstrate the absence of any issue of material fact, even though the allegations of the pleadings standing alone may raise such an issue. Prant v. Sterling, 332 N.J. Super. 369, 377 (Ch. Div. 1999), aff'd, 332 N.J. Super. 292 (App. Div. 2000).

2. Advantages for Summary Judgment

The obvious advantage to summary judgment, in the event it is granted, would be a complete dismissal of the case. If summary judgment is granted, the opposing party's only recourse would be to file an appeal to challenge the legal basis for the summary judgment being granted. However, beyond the obvious of a complete dismissal, there are other potential advantages to filing summary judgment, as follows:

- The summary judgment pleading process provides the parties an opportunity to flesh out claims, which would include an ability to determine the precise nature and legal theories behind the opposing party's individual claims.
- Summary judgment also provides an opportunity to dismiss frivolous or weaker claims, from the more substantive claims. A partial summary judgment motion is often a strong tactic to use to ferret out particularly weak or claims that may involve potentially more damages than the others.
- Summary judgment may also provide an opportunity to limit individual damage claims. For example, summary judgment can be used as a tool to have punitive damages struck as a requested remedy.
- In a claim where the factual basis for the underlying theories are unclear or deficient, summary judgment may also be used as a tool, early in litigation, to attempt to obtain the factual predicate for the opposing side's claims.

3. Disadvantages of Summary Judgment

Just as obtaining summary judgment would be a complete dismissal of the case, a denial of summary judgment poses the opposite, i.e., the party moving for summary judgment is faced with a trial on the merits regarding the claims that do survive a summary judgment motion. In addition, there are other disadvantages with a summary judgment motion that is lost, including the following:

- If summary judgment is denied, the moving party is required to go to trial on the claims that survive summary judgment. Although a party may pursue an interlocutory appeal, the standards for interlocutory appeal are severe.
- In federal court, 28 U.S.C. Section 1292(b) provides for a two-part process, as follows: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . ." If a district court does not initially certify a question *sua sponte*, a litigant may petition for certification to the court of appeals. See, e.g., United States v. A Parcel of Land, 742 F. Supp. 189 (D.N.J. 1990) (certifying question for appeal in response to litigant's petition for interlocutory review of summary judgment order); see also Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 601-02 (2009) ("[A] party may ask the district court to certify ... an interlocutory appeal.")
- This federal statute "was framed with special attention to the problems of

protracted and expensive litigation". Zenith Radio Corp. v. Matsushita Electric Industrial Co., 494 F. Supp. 1190, 1244 (E.D. Pa. 1980) (reviewing legislative history). In Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974) (en banc), the Third Circuit stated the standards governing the exercise of a district court's discretion to certify a question under Section 1292(b): "The order must (1) involve a 'controlling question of law,' (2) offer 'substantial ground for difference of opinion' as to its correctness, and (3) if appealed immediately 'materially advance the ultimate termination of the litigation.'" Id. at 754. "If satisfied, these factors exhibit the 'exceptional circumstances' upon which a district court may base its decision to grant interlocutory review." Florence v. Board of Chosen Freeholders, 657 F. Supp. 2d 504, 507 (D.N.J. 2009). In any event,"[t]he decision whether or not to grant certification is entirely within the district court's discretion, and even if all three criteria under Section 1292(b) are met, the district court may still deny certification." Krishanthi v. Rajaratnam, 2011 WL 1885707, *2 (D.N.J. 2011) (internal quotations omitted) (quoting Morgan v. Ford Motor Co., 2007 WL 269806, *2 (D.N.J. 2007). Moreover, upon certification by the district court, the court of appeals retains discretion as to whether to accept an interlocutory appeal. Gerardi v. Pelullo, 16 F.3d 1363, 1372 (3d Cir. 1994) (noting that, in comparison to Rule 54(b), 28 U.S.C. § 1292(b) provides a court of appeals "discretion in determining whether to permit an interlocutory appeal certified by the district court.").

- In New Jersey state courts, Rule 2:2-4 provides in pertinent part as follows: "…[T]he Appellate Division may grant leave to appeal, in the interest of justice, from an interlocutory order…" The Appellate Division has comprehensive power to permit, in its discretion, an appeal from an interlocutory order. However, the power to grant leave to appeal is "highly discretionary" and "exercised only sparingly." See State v.

Reldan, 100 N.J. 187, 205 (1985). Therefore, leave is granted only "in the exceptional case where, on a balance of interests, justice suggests the need for a review in advance of final judgment." Cardinale Trucking Corp. v. Motor-Rail Company, 56 N.J. Super. 150, 152 (App. Div. 1959); Appeal of Pennsylvania R.R. Co., 20 N.J. 398, 409 (1956); Romano v. Maglio, 41 N.J. Super. 561 (App. Div. 1956). However, as explained in Romano, leave to appeal will be granted "…where some grave damage or injustice may be caused by the order below…." An appellate court "will 'decline[] to interfere with [such] matters of discretion unless it appears that an injustice has been done.'" Cooper v. Consolidated Rail Corp., 391 N.J. Super 17, 23 (App. Div. 2007)(quoting Comerford v. Flagship Furniture Clearance Ctr., 198 N.J. Super 514, 517 (App. Div. 1983), certif. denied, 97 N.J. 581 (1984)).

- "It is well settled that discretion means legal discretion, in the exercise of which the trial judge must take account of the law applicable to the particular circumstances of the case and be governed accordingly. If the judge misconceives the applicable law or misapplies it to the factual complex, in total effect the exercise of legal discretion lacks a foundation and becomes an arbitrary act. When this occurs it is the duty of the reviewing court to adjudicate the controversy in light of the applicable law in order that a manifest denial of justice be avoided." State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966).
- A denial of summary judgment may obviously provide additional incentive and bargaining power to the non-moving party.
- Summary judgment can also involve a significant expense, both in terms of attorneys' fees as well as outstanding costs.
- In a case where summary judgment is not likely, this also will provide an opportunity for the opposing party to explore in detail the specific facts and legal theories behind the moving party's case. Although discovery

certainly would provide for the full exchange of discoverable information, a summary judgment motion may alert the opposing party to specific legal theories and nuances that would be advanced to trial.

B. Using Time Limits And Strategies To Your Advantage

Under federal court practice in New Jersey, a summary judgment motion is typically filed at the close of discovery, pursuant to an established case management order. Typically, the federal courts in New Jersey will set a deadline for a summary judgment motion that is sufficiently timed to coincide with the end of discovery, so that the parties have ample opportunity to file and prepare summary judgment briefs. In addition, the federal courts also typically would not establish or set a trial date, until all dispositive motions have been briefed, argued and decided. Therefore, a summary judgment motion in federal court is particularly appropriate and useful to the defense, and would avoid the possibility that the defense team will need to both prepare for trial while also being involved in summary judgment preparation, filing and pleadings.

In state court, the New Jersey court rules have a much more strict and limited time frame. Under New Jersey Rule 4:46-1, a summary judgment motion must be filed, with a return date that is at least 30 days before the scheduled trial date. Because New Jersey court return dates are essentially every two weeks, on alternating Fridays, and given that summary judgment motions must be filed at least 28 days before a return date (Rule 4:46-1), this often means that the summary judgment motion must be filed approximately 60 days before the scheduled trial date. Otherwise, the opposing party may file a motion to have the summary judgment motion dismissed as untimely and late.

The dilemma often faced with respect to summary judgment is that a summary judgment motion is often not ready for filing until the close of discovery, including the completion of all paper discovery and plaintiff and defense depositions. As a result, this often means that a summary judgment motion cannot be adequately and fully prepared until the close of discovery. Yet, the dilemma that arises is that a trial date is often set by the court immediately after the close of discovery, and is typically set in a period of eight to ten weeks after the close of

discovery. Therefore, this may often leave little or no time to prepare a summary judgment motion.

To avoid this dilemma, it is advisable that a party contemplating a summary judgment motion begin the process of preparing the motion, and gathering necessary affidavits and other evidence, sufficiently in advance of the discovery end date, so as to avoid missing the summary judgment filing deadline. This may also necessitate having depositions taken sufficiently in advance of the discovery end date, to avoid this time dilemma. One alternative would be also to obtain opposing counsel's consent to a late filed summary judgment motion, which courts will generally accept.

Lastly, even if a summary judgment motion is timely filed, the time frames set out above are such that there may be only limited time available, after a summary judgment motion is denied, for the parties to adequately prepare for trial. New Jersey trial practice is wide and varied throughout the state, particularly as to whether or not a case will go to trial on its first, second or later trial call. Nevertheless, given that there is often less than one month from the summary judgment decision until trial, and given that the parties often do not know the adequate status of the trial date until immediately prior to the trial call, the parties are often faced with having to begin trial preparations, or least preliminary preparations, prior to knowing a summary judgment decision.

C. What Exactly Is A "Triable Issue"?

Under both federal and state law, the legal standard as to what is a "triable issue" is relatively similar. Regarding what is a "triable issue," under federal law, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89 (1968), the U.S. Supreme Court affirmed a grant of summary judgment and observed that "[it] is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties'

differing versions of the truth at trial." Thus, in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, the Court reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds. Id. at 158-59. Therefore, is the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. See Anderson v.Liberty Lobby, 106 S.Ct. 2505 (1986).

Under state law New Jersey state courts adopt a similar standard as to what is a "triable issue of fact, sufficient to support the denial of a summary judgment motion. "The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Liberty Lobby, 477 U.S. at 249). The Brill Court noted that credibility determinations will continue to be made by a jury and not the judge. Id. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of R. 4:46-2. As Brill noted: "The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (quotations omitted).

D. Evidence Objections

In connection with summary judgment motions, a number of objections are available regarding the evidence put forward by the parties.

First, a party filing a motion for summary judgment, or opposing a motion for summary judgment, is required to cite to specific materials in the record, which would include depositions, documents, affidavits of witnesses, stipulations, admissions or other sworn answers to interrogatories. F.R.C.P. 56(c); Rule 4:46-2(a). In responding to a summary judgment motion, parties are not permitted to simply deny stated facts, but must provide specific citations to the record evidence to establish that the fact is truly in dispute. F.R.C.P. 56(c); R. 4:46-2(b).

Therefore, if a party seeks to oppose a summary judgment motion by not citing to record evidence, and simply making a denial of an asserted fact, that is evidence that a court should not consider in opposition to summary judgment.

Second, in the event a party fails to properly respond to a fact asserted by the moving party, that does not result in an automatic finding of that fact in the moving party's favor. Rather, under both state and federal law, the court is still required to make a determination as to whether the facts asserted by the moving party are sufficiently supported so as to show them to be not in dispute. R. 4:46-2(b). In fact, under federal rules, the court has the ability to allow the non-moving party an opportunity to properly support the fact, or in the alternative it may consider the fact undisputed for purposes of the motion. F.R.C.P. 56(e).

Third, both federal and state law provide that evidence is only sufficient with respect to summary judgment to the extent that it is supported by admissible evidence; that is, either party may object to the opposing party's materials that are cited if the material is presented in a form that would not be admissible in evidence at trial. F.R.C.P. 56(c)(2). For example, if a party submits hearsay evidence that is not otherwise admissible at trial pursuant to a hearsay exception, both federal courts and state courts have ruled that these facts may not be considered in a summary judgment decision. Smith v. City of Allentown, 589 F. 3d 684, 693 (3d Cir. 2009); Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 457 (App. Div. 2009).

Lastly, one other key objection relates to a party attempting to change his/her testimony in response to a summary judgment motion. That is, a moving party often cites to the deposition of the opponent in order to support the movant's application for summary judgment. Under the rules, the opposing party is permitted to submit a sworn affidavit to contrast or contradict the moving party's proposed, undisputed facts. However, both federal and state law recognize the "sham affidavit" doctrine. This doctrine provides that a party is not permitted to refute or contradict their prior, sworn testimony at a deposition, by submitting a contrary affidavit in opposition to summary judgment. See Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703, 706 (3d Cir. 1988) (if a party "who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham

issues of fact"); Shelcusky v. Garjulio, 172 N.J. 185, 200-201 (2002) ("sham facts should not subject the defendant to the burden of trial").

Conducting Intenal Investigations and Handling Formal Complaints

Submitted by Michelle J. Douglas

Workplace Disputes: From Administrative Review to Trial

Conducting Internal Investigations and Handling Formal Complaints –

11:15 AM – 12:15 PM – ***Michelle Douglass***

I. Internal Complaint Process and Procedures (w/Sample Checklist)

An internal complaint process should be well established in any employment organization. Whenever people work together, disputes are likely to arise. An employee may claim discrimination, harassment, misconduct by a co-worker or supervisor, or any of a variety of other allegations that could lead to disciplinary action, litigation or provide an opportunity to improveworkplace practices and policies.

In many unionized companies, complaints are called grievances and negotiations or contracts may govern the proper procedures when an employee files a grievance. Even in nonunion firms, some aspects of complaint handling, such as retaliating in any way against an employee who lodges a complaint, may be subject to federal regulation under the National Labor Relations Act or Equal Employment Opportunity Commission (EEOC) guidelines.

Employers can establish a specific procedure for discrimination and harassment complaints or use the procedure already in place for other types of complaints. However, it is important to note that discrimination and harassment complaints can be complex, sensitive and may potentially involve external agencies, such as the

Commission. Therefore, it is vital that those responsible for dealing with internal complaints have the appropriate expertise and receive relevant training.Ensuring that the employer responds to all complaints promptly and thoroughly reduces the chance of employee lawsuits and helps foster an atmosphere of respect and trust. For many types of complaints, planning an internal investigation should be one of the first steps the employer takes.

Failure to investigate and address an internal problem in a prompt, respectful, and fair manner can encourage litigation. An employer can be held liable if the initial recipient of the complaint either ignores it or tells the employee not to pursue it. The best way to avoid bungling the process is to have a written complaint resolution or grievance procedure in place. The procedure should be disseminated to all employees through the employee handbook and should direct aggrieved employees to reasonable and neutral decision makers.

Characteristics of a good internal complaint process

Fair – This means that both the person complaining (the complainant) and the person being complained about (the respondent) should have the opportunity to present their version of events, provide supporting information and respond to any potential negative decisions. In addition, the person investigating and/or making decisions about the complaint should be impartial; that is, he or she should not favour the complainant or the respondent or prejudge the complaint in any way. The investigator should not have

an established relationship with any of the parties involved. All relevant witnesses should be identified and interviewed.

Confidential – This means that information about a complaint is only provided to those people who need to know about it, in order for the complaint to be actioned properly. People interviewed should be cautioned to maintain confidentiality.

Transparent – The complaint process and the possible outcomes of the complaint should be clearly explained and those involved should be kept informed of the progress of the complaint and the reasons for any decisions.

Accessible – The complaint process should be easy to access and understand, and everyone should be able to participate equally. For example, an employee may require a language interpreter to understand and participate or a person with a disability may need information provided in a specific format.

Efficient – The complaint process should be conducted without undue delay. As time passes, information relevant to the complaint may deteriorate or be lost, which will impact on the fairness of the process. In addition, unresolved complaints can have a negative and ongoing impact on a workplace.

Protection- The complaint process should protect employees from being victimized because they made a complaint; and, as to the accused, should guard against malicious or vexatious complaints. The storage of all materials associated with an investigation should be managed appropriately to ensure confidentiality and protection.

Stages in a complaint process

1. **Initial Contact Point**

Individuals designated to receive discrimination complaints are often high-level HR executives, in-house counsel, or respected managers. There should be more than one channel by which a complaint can be made. In larger organizations, the initial contact person is usually the HR, EEO Officer or a Harassment Officer. In smaller organizations, the initial contact person is usually a line manager, supervisor or designated outside person such as a lawyer or an out-sourced investigator. The contact person, however, should be the person responsible for investigating or making decisions about a complaint such as referring the matter to an independent third party.

The contact person or person responsible for investigating the complaint should:

- be available to listen to an employee's concerns about discrimination or harassment
- not form a view of the merit of any allegations
- provide information about the internal complaint process
- advise the person that in some situations where serious allegations are raised – for example, allegations that may expose the organisation to legal liability – the issue may need to be reported to management and dealt with as a formal complaint
- where appropriate, provide support for a person if he or she wants to try and resolve the issue personally

- provide information about available support services, for example, workplace counselling services
- outline other options available to the person, such as lodging a complaint of discrimination or harassment with an external agency.

2. Attempt Early Resolution

In many situations it is appropriate to consider early resolution of an initial complaint without undertaking an assessment of its merit. This approach may be useful where the complainant indicates a desire to sit down and discuss the matter with the respondent informally and this seems appropriate in the circumstances and the behaviour being complained about is not serious and does not appear to be discrimination or harassment, as defined by the organization's policy.

Early resolution may involve:

- a direct private discussion between the complainant and the respondent
- an impartial third person conveying information between those involved
- an impartial third person helping those involved to talk to each other and find a solution.
- In some situations the impartial third person may need to be someone external to the organization, such as a professional mediator.

3. Formal Resolution

If a person wants to proceed with a formal complaint about discrimination or harassment, or if this is considered to be the most appropriate course of action, the following steps are recommended.

a. Obtain information from the complainant

The person handling the complaint (the complaint officer) should:

- provide information about the complaint process, potential outcomes, options for assistance/support and protection from victimization
- ensure the allegations are documented, either by the complainant or the complaint officer
- explain that the process is confidential, what this means and why it is important
- explain what records of the complaint will be kept, for how long and where
- explain the action that may be taken if the complaint is found to be vexatious or malicious
- ask the complainant to provide relevant documents or details of witnesses that may support the allegations.

Where there is a concern about supporting information being destroyed or compromised, the complaint officer should try to obtain this information before taking any further action.

b. Advise the respondent about the complaint

The complaint officer should:

- advise the respondent that a complaint has been made against him or her and provide as much information as possible about the allegations and supporting information (where applicable)
- confirm that he or she will be given the opportunity to respond to the allegations in writing or through an interview
- provide information about the complaint process, potential outcomes and options for assistance/support
- explain that the process is confidential, what this means and why it is important
- explain what records of the complaints will be kept, for how long and where
- explain that it is unacceptable to victimize someone who has made a complaint.

c. Gather and Assess the information

If the respondent confirms that he or she did what is alleged to have occurred, and if this behavior would be considered discrimination or harassment as defined in the organization's policy,the next step is to consider an appropriate outcome (see below). It is recommended that the respondent is provided with the opportunity to comment on any proposed decision and outcome before a final decision is made.

If there is disagreement about what happened, the complaint officer should consider whether there is other information that will help to determine what happened. It is generally understood that the person making the decision should be satisfied that it is 'more probable than not' that what is alleged to have happened did happen.

Given the nature of discrimination and harassment, there may often be no direct witnesses or documents to support the complainant's version of events. This does not mean that the allegation is untrue. In these situations, the complainant should be given the opportunity to comment on the information that has been provided by the respondent and to provide any other information to support his or her allegations before a final decision is made.

4. Outcomes from the Process

a. Where the allegations are admitted or substantiated

Outcomes for the respondent may include:

- disciplinary counselling
- an official warning
- a requirement to attend discrimination and harassment awareness training
- a requirement to provide a formal apology to the complainant
- disciplinary action (e.g. demotion, transfer, suspension, probation or dismissal)
- participation in mediation to restore relationships in the workplace.

Outcomes for the complainant may include:

- re-crediting of any leave taken as a result of the discrimination or harassment
- supportive counselling
- a change in the work environment, as requested, for example, a change in work teams or location
- participation in mediation to restore relationships in the workplace.
- It is important that the complainant is provided with general information about the outcome of a complaint, as this may affect their decision to pursue the matter with an external agency. The level of detail provided should be balanced against the need to respect the privacy of the respondent.

b. Where the allegations are not admitted or substantiated

Where allegations have not been admitted or substantiated, it may still be appropriate for the employer to take some action as a result of the complaint. For Example, it may be appropriate to:

- provide refresher training for all staff regarding appropriate workplace behaviour, and/or
- re-issue the discrimination and harassment policy or code of conduct to all employees.
- If such action is taken, it is important that it is not done in a way which could be seen as singling out or punishing the respondent, especially where there has

been nofinding that he or she has breached the organisation's policy or code of conduct.

Often times it is prudent to retain legal or professional advice when a matter is in dispute. The goal is to avoid costly and disruptive litigation. Many times it is the most cost effective and path of least resistance to offer a severance package and release of all claims to the complainant or the respondent.

II. Documenting and Filing of the Complaint

Documentation and recordkeeping is critical and required under the EEOC, ADEA and the Fair Labor Standards Act. For instance, under the EEOC regulations, employers are required to keep all personnel or employment records for one year. If an employee is involuntarily terminated, his/her personnel records must be retained for one year from the date of termination. *29 C.F.R. Part 1602.*

Under ADEA recordkeeping requirements, employers must also keep all payroll records for three years. Additionally, employers must keep on file any employee benefit plan (such as pension and insurance plans) and any written seniority or merit system for the full period the plan or system is in effect and for at least one year after its termination. When a former employee is terminated, in addition, employers must retain records related to job applications, resumes, and other forms of job inquiries; promotions, demotions, and transfers; selection for overtime, training, layoff, recall, or discharge; job order submitted to employment agencies; candidate test papers for any

position; physical exam results if used in employment decisions; job ads or internal notices relating to job openings; and employee benefit plans.

Most employment laws, including Title VII, the Family Medical Leave Act, OSHA and the Equal Pay Act, to mention a few, all have specific requirements for the retention of employee documents.

Companies should memorialize in writing that the investigation is being conducted for the purpose of obtaining legal advice. The legal nature and purpose of the investigations also should be communicated to all witnesses and to all non-attorney personnel who are assisting company counsel.

At the outset of an internal investigation, and in a contemporaneous writing, companies should document that the investigation is being conducted for the purpose of obtaining legal advice and at the direction of internal or outside counsel. This writing should include a statement, set forth as succinctly and as narrowly as possible, describing the specific issue(s) on which the company is seeking legal advice in that investigation. To the extent the precise issues may expand or otherwise shift over time, the company should update this document to reflect such changes.

Companies should also take certain formal precautions to ensure the attorney-client privilege, which attached at the beginning of the investigation, continues to attach to every stage going forward by communicating the investigation’s legal purpose. Non-attorneys who are involved in conducting the internal investigation should be appraised of the investigator's legal nature and general purpose. Companies should

also inform witnesses — in writing — that the purpose of interviews is ultimately to obtain or render legal advice.

III. Preserving Attorney-Client Privilege and Work-Product Doctrine

A cornerstone of the attorney-client privilege is that for the privilege to apply to a communication, the communication must have been made for the purpose of obtaining legal advice. Attorney-client privilege "is 'triggered only' by a request for legal advice, not business advice." *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).Corporate internal investigations are routinely protected from disclosure under this principle. But when company counsel asserts the privilege to protect an internal investigation that was conducted under standing corporate policies or pursuant to certain regulatory requirements, the privilege assertion may be challenged in court.

In these cases, civil litigants or other third parties who are trying to obtain company records regarding an internal investigation (such as emails, memos and other reports) contend that the investigation is not privileged because it was conducted for business purposes, and not for the purpose of obtaining legal advice. For a company to insulate against these challenges and to preserve the attorney-client privilege, company counsel must be able to demonstrate that the internal investigation was conducted for the purpose of obtaining legal advice. There are five steps every company can take to accomplish this:

(1) obtain from the client a written request for legal advice in advance of the investigation;

(2) send a confirmation in writing that the purpose is to render legal advice and/or to render services in anticipation of litigation;

(3) admonish witnesses that interviews are subject to the attorney-client privilege, which the witnesses may not waive, and that the attorney represents the corporation, rather than individual employees;

(4) separate discoverable documents from privileged documents;

(5) label privileged documents as “privileged attorney client communication” and/or “attorney work-product,” as well as “prepared in anticipation of litigation” when appropriate.

• ***Update Corporate Policies and Procedures***: Corporate policies and procedures should include a specific statement that all internal investigations are to be conducted for the purpose of obtaining legal advice.

In sum, while the attorney-client privilege can provide valuable protections attendant to workplace investigations, its protections are not without exceptions. In undertaking or overseeing such investigations, counsel should remain aware of the impact the use of the investigative file and other actions may have on the extent to which attorney-client communications are protected by the attorney-client privilege. Note, in *Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524 (1997), the New Jersey

Supreme Court, applying state law, rejected the blanket contention that the attorney-client privilege protects the entire investigatory process simply because the defendant corporation hired attorneys to participate in the investigation.

IV. Conducting the Investigation

Ideally, attorneys, whether in-house or external counsel, should initiate and direct every internal investigation. Investigative work can be delegated to non-attorneys agents, as long as an attorney is directing and overseeing their work. Typically, an attorney is called upon to oversee the workplace investigation process to ensure the investigations meet legal requirements and comply with the unique substantive and procedural issues that arise when investigating public employees or high level public officials. The investigative process typically consists of the following phases:

(1) Responding to the Complaint;

(2) Defining the Investigation;

(3) Overseeing the Investigation; and

(4) Concluding the Investigation.

Throughout the process, issues often arise that require legal advice, including: (1) whether an investigation is required; (2) whether any interim measures are necessary and appropriate; (3) whether the investigation should be conducted under the attorney-client privilege protection; (4) how to safeguard confidentiality, privacy, due

process and First Amendment rights; and (5) whether and how to disclose the results of the investigation.

As legal advisors for the organizations they serve, in-house attorneys frequently become involved in handling employee complaints arising from a variety of legal issues, most commonly discrimination and harassment. The employer's duty to investigate a complaint of harassment was highlighted in two Supreme Court decisions. In *Burlington Industries. Inc. v. Ellerth,* 118 S.Ct. 2257, 2267 (1998), the court stated that the "[e] mployer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it". In *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998), the court added that an employer can avoid or minimize liability for actionable harassment by investigating and taking prompt remedial action to end the harassment.

Failing to conduct an investigation or conducting an inadequate investigation precludes the employer from using an investigation as an affirmative defense during litigation and introduces the risk of the court allowing punitive damages. In-house counsel’s understanding of and adherence to the principles of a sound workplace investigation are therefore vital to managing the organization’s exposure to liability.

One of the most crucial steps in planning any workplace investigation is to choose an investigator. Qualification factors include: knowledge of the applicable legal issues; an ability to conduct interviews and assess credibility; an ability to develop rapport during interviews; objectivity and professional credibility; a commitment to

confidentiality; sufficient time to devote to the investigation; and experience and effectiveness as a potential witness in any ensuing litigation.

In-house attorneys who become aware of employee complaints that warrant an investigation can choose one of three roles in the ensuing investigation. First, they can serve in the traditional role as legal advisor to the organization by letting someone else, typically in human resources, oversee the investigation intended to inform the attorney's provision of legal counsel. That is the most hands-off approach, and the one that lays the strongest foundation for the assertion of a privilege for the attorney's work.

Second, they can oversee the investigation, which often includes selecting the investigator. This option provides the attorney with more control over the process while still maintaining a clear distinction between the roles of attorney and investigator, but only if the investigator is allowed to operate with reasonable autonomy.

Third, they can conduct the investigation themselves. This option provides an in-house attorney with the greatest control over the investigation, but is dependent on the ability of the attorney to effectively and competently conduct workplace investigations. It also obscures the line between the attorney's roles as legal advisor and fact-finder, which can have significant implications later if the employer asserts a privilege.

In regard to a discrimination complaint, the EEOC has issued guidance on the minimum questions that should be asked of the Complainant, alleged harassers, and third party witnesses. These questions should be asked, if relevant to the facts of your

particular type of investigation, to help insure thoroughness. These questions are as follows:

Questions to Ask the Complainant:

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Accused:

- What is your response to the allegations?
- If the accused claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

See, https://www.eeoc.gov/policy/docs/harassment.html#VC1e

V. How to Spot Investigation Cracks

- ***Not Obtaining Relevant Documentation from ALL Sides.***

This includes documentation related to the comparator employees, if you are investigating a disparate treatment claim. (Note: Due to privacy rights, do not seek

medical/diagnosis information of comparators in disability disparate treatment cases. In that case, try to obtain documentation of work-related physical limitations of the comparators. That is probably as close as you can get.)

- ***Not Getting the Complete Story from the Complainant before Anyone Else.***

Assuming you are able to interview the Complainant, get the complete story from the Complainant first. If the Complainant is already represented by an attorney, you will need to make a request for an interview with the attorney. Rarely is this request denied, but it can happen. In that case, you have to go on any written or verbal complaints or statements the Complainant has made to co-workers, supervisors, Human Resources, or others. You want to have the full story from the Complainant before you interview the accused employee(s).

- ***Not Interviewing all witnesses identified by the Complainant.***

Unless a witness is clearly irrelevant, you must interview all witnesses identified by the Complainant and then some- Also, document with an investigator's note the reason you did not interview any witness. For example, when you ask the Complainant to identify all the witnesses that the Complainant would like to be included in the investigation, also ask the Complainant to state what he/she expects to be factual information gleaned from each named witness. If the "performance" of the Complainant is not an issue in your investigation, then you do not need to interview a named witness whose only knowledge is how great the Complainant was at his/her job.

- ***Failure to Document the Time you Spend Interviewing Each Witness.***

The last thing you want is for any one person to disclose that the investigator had only spent 10-15 minutes with one of the major players. Taking the time and getting the whole story from your witnesses, together with documentation of your time will help eliminate a faulty investigation.

Interview witnesses to whom the Complainant may have made contemporaneous statements. Since this is a possible exception to the hearsay rule, and since you may determine this information to be trustworthy, for whatever reason, this type of information should be obtained and documented in the investigation. You can balance it with your other evidence and decide how much weight to give it later. So, when interviewing your Complainant, be sure to ask if he/she contemporaneously reported the incident to any peers or third parties, as this may be evidence that the harassment or alleged incident occurred.

Sometimes the witnesses may even be former employees, customers, students, clients. Understandably, the employer may sometimes be reluctant to get their customers involved in an internal employee issue, so in that case, you have to weigh how important the information is against the employer's desire to not unnecessarily involve customers in their private personnel matters. Can the information be obtained from another source without involving a customer? Is the information to be sought duplicative of information you already know? If so, you may not need to involve a customer.

- ***Not Following the Same Note-Taking Procedure for ALL Witnesses.***

The best way to avoid a claim that you favored or disfavored any one witness, is to make sure you use the same note-taking procedure for all witnesses, including the Complainant and the accused employee. The best method is to simply use a tape recorder for all interviews, unless you need to jot down a few key points as a reminder to get a document or to interview someone that had not been previously disclosed.

- ***Not Circling Back for Re-interviews Of Witnesses.***

Inevitably, there will be information you learn from one or more witness that will require you to circle back to one or more witnesses, including the Complainant and the accused to clear up new issues that have come up with other witnesses. It is wise to tell witnesses at the end of the initial interview that it may be necessary to speak to them again for any follow-up questions.

- ***Not Making Credibility Determinations.***

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged wrongdoing in fact occurred. Factors to consider include:

  - Inherent plausibility: Is the testimony believable on its face? Does it make sense?
  - Demeanor: Did the person seem to be telling the truth or lying?
  - Motive to falsify: Did the person have a reason to lie?

- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- Past record: Did the accused have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged wrongdoing by no means necessarily defeats the complainant's credibility, since, for example, harassment often occurs behind closed doors. Furthermore, the fact that the accused engaged in similar behavior in the past does not necessarily mean that he or she did so again. Nonetheless, it is up to you as the investigator to make determinations of credibility given the facts and circumstances. If credibility is simply not capable of being reached, explain the basis for not being able to make such a determination.

VI. Analyzing Investigation Results

Once you have completed the interviews, examined the documents and materials, and reviewed the policies, the next step is to organize and analyze the investigatory materials. These would include your notes, witness statements, documents, e-mails, policies and personnel records.

Evaluate truth and accuracy. What's the difference between the two? An article written by Jathan W. Javone for SHRM provides an example by using a scene from a Pink Panther movie to explain. In the scene, Inspector Clouseau asks an innkeeper, "Does your dog bite?" The innkeeper says no. When Clouseau reaches to pet the dog, it snaps at him. The startled detective says to the innkeeper, "You said your dog doesn't bite!" The innkeeper replies: "That is not my dog."

Maria Sorolis of the law firm of Allen, Norton & Blue PA in Tampa, Fla., recounts a real-life example of evaluating truth and accuracy. Sorolis was once called to investigate complaints that a certain employee was "leering" at others.

Here's what she found: The employee did in fact look at others in a way that might have been unusual. But was he leering? No. It turns out he had a physical condition that created the impression he was staring when he was not.

Look for biases. Consider any cultural, societal or ethnic tendencies that may influence either the perceptions of the complainant or the behavior of the accused. For example, people from some cultures are more physically demonstrative than others. Others who are not familiar with those norms may erroneously infer harassing intentions. Such cultural differences do not necessarily excuse behavior that is unwanted or clearly inappropriate in the workplace, but they may shed a different light on how to approach the perpetrator and correct the problem.

Avoid legal conclusions. Don't focus your investigation on whether an employee violated some law; instead, determine whether or not the employee violated the company's policies or values. Framing conclusions in legal terms can only make matters worse. Avoid it at all costs.

If, for example, you find that "harassment" occurred, you may increase the anger or hostility of the accused and reinforce his feeling that he is the victim. Moreover, if litigation ensues, you may have eliminated your attorney's ability to argue successfully that the facts do not meet the legal threshold necessary to proceed to trial. The legal standards for violations of law are usually different than those standards expected of the employer. At a minimum, you probably have driven up the price of an early settlement.

Make a Decision and Properly Communicate it. A sure way to guarantee a lawsuit is failure to take prompt and remedial action. This includes determining whether a company policy has been violated within a reasonable time of the making of the complaint and if so, taking disciplinary action based on the severity of the violation. The type of disciplinary action meted out must necessarily include a review of the type of disciplinary action taken against similar employees in comparable situations. The last thing the employer wants is a selective enforcement of disciplinary allegations or disparate treatment allegation lodged against it.

Corrective measures short of termination may include individual training sessions for the accused, group training, counseling, referrals to an employee assistance

program or reassignment. (If a potential reassignment involves the complainant, make sure this step is entirely voluntary and confirm your understanding in writing.)

If your investigation results in a finding that the complaint is unfounded, disciplining the complainant is rarely appropriate. Consider doing so only in egregious cases of dishonesty, and, even then, get advice from employment counsel before acting. State and federal anti-retaliation laws typically protect employees from punishment even when their complaints are unsubstantiated. In most instances, it is better to communicate strongly and unequivocally that the complaint is false.

Once you've made your findings and completed your report, shift your focus to communicating the results of the investigation in a manner that achieves two objectives: getting the workplace back to normal and keep the lawyers away. The following should help:

Inform the complainant. Tell the complainant the results of the investigation and corrective action plan. If your findings substantiate her complaint, attempt to secure her acceptance of the action plan. If she expresses doubts or reservations, explain that you will be monitoring the situation and that if your solution does not work as envisioned, you will replace it with another one.

If your findings do not substantiate the complaint, focus the discussion on the path forward: the company's commitment to a respectful, harassment- and retaliation-free environment and your willingness to address future issues promptly and resolutely. Emphasize that even if you can't agree on the past, you can agree on what

will be acceptable moving forward. As Winston Churchill said, “If we quarrel with the past, we may lose the future.”

Inform the accused. If your findings sustain the complaint, you will need to communicate the results of the investigation and corrective action and discipline imposed. Although sharing details of the investigation is generally not advisable, you should briefly summarize your findings and why you reached the conclusions you did. Decline any invitation to debate with a reminder that your findings don’t represent your judgment of the individual, only your judgment of what sort of workplace behavior is or is not acceptable.

If your investigation does not sustain the complaint, you probably need to do more than merely communicate that fact. Caution the accused against any form of retaliation, and, if you believe that the accused may have engaged in inappropriate conduct but the investigation did not reveal enough evidence to support such a finding, advise the accused that the complainant’s alleged facts, if true, would have violated company policy. Confirm his agreement that such conduct does not belong in the workplace and that he will not engage in anything like it in the future.

If, in the rare case you find that the complaint was completely without foundation—the alleged behavior did not occur, or was not inappropriate by any reasonable standard—it would be appropriate to tell that to the accused, without elaboration. You still must reinforce, however, that you will not tolerate any negative

behavior toward the complainant, and you should counsel the accused not to seek an apology from the complainant.

Inform others. Generally, with respect to other employees involved in the investigation, the less said, the better. However, you may need to communicate some information regarding the results of the investigation to avoid negative speculation. The rule of thumb is to communicate the minimum necessary to avoid potentially harmful speculation. HR professionals must always be on guard for possible defamation or invasion of privacy claims brought by complainants or accused employees when embarrassing or hotly contested allegations are revealed to persons who have no business reason to know.

Reiterate the need for employee cooperation in maintaining discretion and ensuring that no one experiences retaliation. However, be aware that overly broad confidentiality rules can be deemed to unlawfully restrict both union and non-union employees' rights to discuss terms and conditions of employment.

VII. Using Investigation Materials in Litigation: Plaintiff and Defense Perspectives

In the employment law context, workplace investigations are different than other pre-litigation investigations in most civil claims. The reason being that the thoroughness and adequacy of the employer's investigation is highly relevant in an employment discrimination claim-not so in most other civil actions.

- **Plaintiff's Perspective**

The workplace investigation is a potentially valuable discovery tool or an opportunity to make the employer look heavy handed and abusive. When an employer receives a complaint of employment discrimination, it is obligated to investigate the allegation promptly and thoroughly. The duty to investigate attaches even if the complainant does not request or consent to the investigation. Under many laws (e.g., Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Occupational Safety and Health Act (OSHA), the Sarbanes-Oxley Act, state and local nondiscrimination laws), employers are legally obligated to investigate complaints (harassment, discrimination, retaliation, safety and ethical) in a timely manner. In addition, any appropriate corrective action is required to be taken by the employer to ensure illegal actions and behaviors cease immediately.

If the investigation is done poorly or in a biased manner, it can be used to establish an independent cause of action, defeat affirmative defenses of the employer and to help bolster the existing underlying claim.

- **Defendant's Perspective**

The workplace investigation process is an important risk management tool for employers when they are faced with a discrimination, harassment, or whistleblower complaint. If investigations are done properly, they can aid employers in avoiding

lawsuits, offer employers affirmative defenses to alleged misconduct, and lessen damage.

In a series of landmark cases, beginning twenty seven years ago, the New Jersey Supreme Court emphasized that under the LAD, § N.J.S.A. 10:5-12(d), an employer's existence and enforcement of effective anti-harassment policies may provide evidence of due care. See *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1992) and its progeny. Three years ago, in the seminal case of *Aguas v. State of New Jersey,* the New Jersey Supreme Court clarified when an affirmative defense is available to employers in response to a LAD supervisor sexual harassment claim, and when no tangible adverse employment action has been taken. *Aguas v. State of New Jersey,* 220 N.J. 494, 499 (2015). In Aguas,the defendant employer asserted as an affirmative defense that it engaged in prompt and remedial action in response to the plaintiff employee's internal sexual harassment complaint and that it conducted a thorough investigation of her complaints.

The Court provided invaluable guidance to employers faced with defending LAD superior sexual harassment claims in court, and adopted the governing standards set forth by the United States Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), for determining an employer's vicarious liability in a plaintiff's sexual harassment negligence-based claim. Specifically, the affirmative defense is available if the employer demonstrates that "'(a) the employer exercised reasonable care to prevent and correct promptly sexually harassing behavior; and (b) the plaintiff employee unreasonably failed to take

advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm.'" *Aguas,* 220 N.J. at 499 (quoting *Faragher*, 524 U.S. at 807; *Ellerth,* 524 U.S. at 765). In so ruling, the New Jersey Supreme Court reaffirmed that the employer's implementation and enforcement of an effective anti-harassment policy and complaint procedure as well as a policy of conducting prompt, thorough and neutral investigations is a critical factor in determining an employer's liability in response to a supervisory sexual harassment claim.

Responsiveness to a complaint and an investigation will not only yield the best information and evidence, but it will also enhance both the investigator's and the employer's credibility. Investigations can help the organization identify and resolve internal problems before they become widespread. Given that every complaint has the potential to become a lawsuit, employers should investigate every case in the manner in which it can be presented to a court of law, if necessary. As potentially disruptive as investigations can be, they must be prompt, thorough and effective to ensure everyone's protection. The following steps should be taken as soon as the employer receives a verbal or written complaint. assessments if there is subsequent litigation. If the facts have been controlled, the tone set, and defenses preserved, an employer will readily want to come forward with investigatory materials in litigation. In short, a good offense is sometimes the best defense.

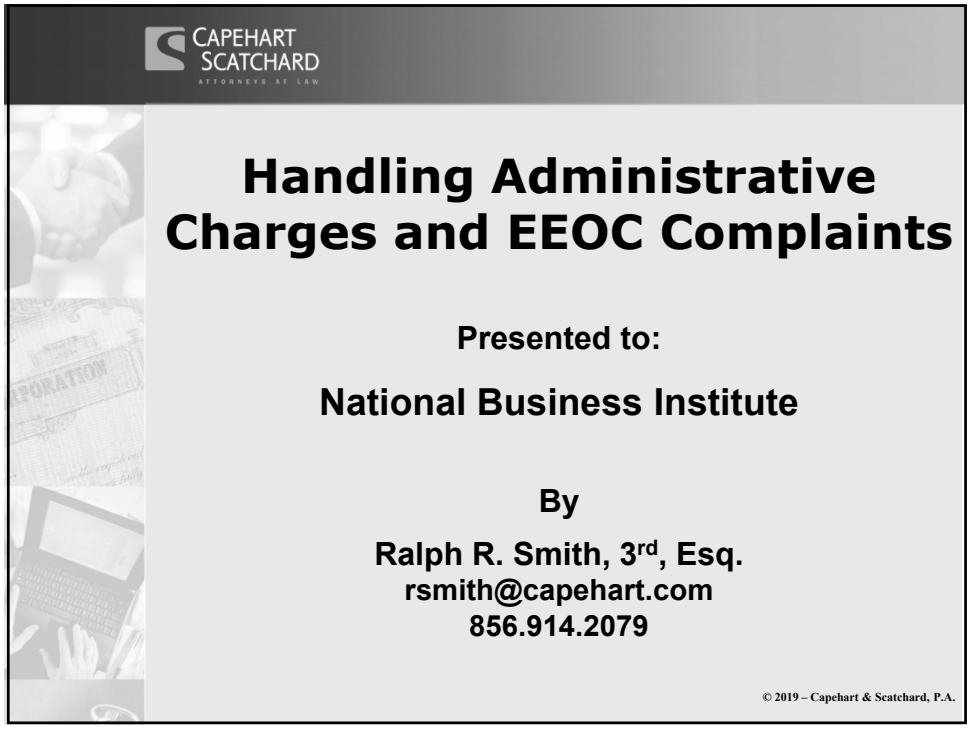
As a caveat, the employer may have a few concerns about the release of all investigative materials such as privacy concerns- will the investigation materials encroach on employee privacy issues? Defamation concerns- the employer must

ensure that the investigator and others did not defame the participants. Retaliation concerns- does the investigative materials suggest that there has been retaliation against anyone involved? Sensitivity issues- will trade secrets, confidential info and the degree of exposure of the company be compromised?

The bottom line: the use of investigative materials in litigation will depend on a number of factors such as whether it is protected from disclosure under the attorney-client privilege, whether the employer seeks to assert the affirmative defense that it conducted a prompt and remedial investigation and as always, whether the particular facts of each case allow the discoverability and use at trial.

Handling Administrative Charges and EEOC Complaints: Plaintiff and Defense Perspectives

Submitted by Ralph R. Smith



The Agencies

- Equal Employment Opportunity Commission (EEOC)
- New Jersey Division on Civil Rights (DCR)

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The Agencies

- EEOC – Enforce federal laws making it illegal to discriminate against a job applicant or employee because of person's race, national origin, age (forty or above), color, religion, sex (including pregnancy, gender identity), disability or genetic information.
- DCR – Investigates violations of New Jersey Law Against Discrimination (LAD), which prohibits similar (and in some instances broader) types of workplace discrimination.

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Process Before the Agency: EEOC

- EEOC after receiving a charge of discrimination, investigates the allegations. Determines whether there is probable cause to believe a violation of law has occurred.
  - After a charge is filed, EEOC issues a Notice advising employer that a charge has been violated. Eventually, the charge is forwarded to the employer for response.

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Process Before the Agency: EEOC

- Employer responds by submitting a Position Statement.
- Position Statement is due 30 days from service of charge – though EEOC will grant at least a 15-day extension to respond, or more with good cause. EEOC is less willing as they had been to grant numerous response extensions.
- Response is now submitted electronically.
- After Position Statement is received, EEOC may/or may not serve a Document Request.

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Process Before the Agency: EEOC

- After completing the investigation, EEOC, if no merit, will issue a finding of no probable cause, and will then issue a right to sue letter. Employee then has 90 days to file suit in Federal Court.
- In the event of probable cause determination, EEOC will engage in Conciliation Process and attempt to resolve. If no resolution, EEOC could litigate matter itself or issue right to sue letter.
- Early on, mediation is also offered by EEOC.

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Process Before the Agency: DCR

- Very similar to EEOC (work sharing agreements).
- Process commences with the Service of a Verified Complaint – Response – Both Answer and Position Statement due in 20 days (extensions are available).
- Along with Verified Complaint, Document Request is also served.
- Agency investigates ➔ Either probable or no probable cause finding – Fact finding conferences are usually done as part of investigation.
- If unhappy with result, appeal is filed to Appellate Division.
- Employer can discontinue claim anytime until there is a final agency decision.

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What to Do If You Get a Charge or Verified Complaint

1. Do Not Ignore It! – Review all paperwork. Get to lawyer if using one. (Should you?) If you need more time to respond, get it as soon as possible.
2. Guard Against Retaliation – if charging party still employed, protect against retaliation.
3. Keep Confidential.
4. Notify insurer, if applicable.

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What to Do?

5. Witness Interviews – Do investigation/ preserve relevant materials.
6. Position Statement – Spell out your company's position. Submit relevant materials. Affidavits? Do on your own or through counsel?
7. If there is a Request for Information, respond to that too. If it is too broad, seek to limit from investigator assigned to case. Remember, EEOC can subpoena documents.

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What to Do?

8. Timing – check for possible limitations argument in defense
   - EEOC – 180 days/300 days – EEOC Exhaustion Requirement.
   - DCR – 180 days or 2 years if you go straight to court.
9. Tick Tock – Average time for EEOC – 182 days to process/investigate charge.

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Questions

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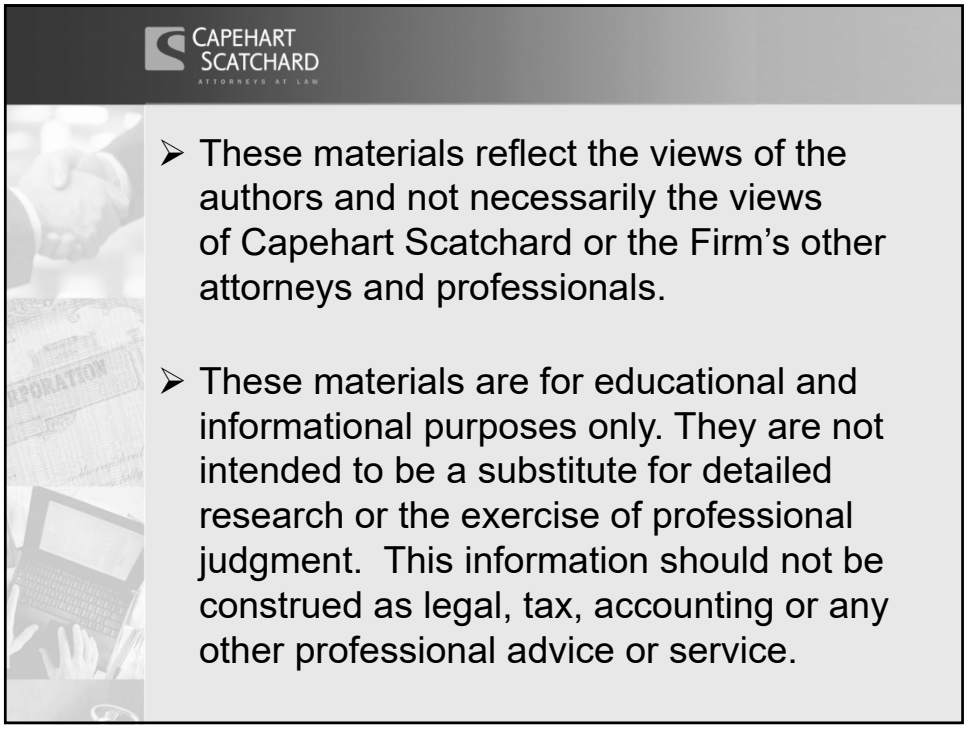
Thank you.

Ralph R. Smith, Esq.
Co-Chair, Labor & Employment Group

Capehart & Scatchard, P.A.

Mt. Laurel, NJ ◆ Philadelphia, PA

856.914.2079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How to Win at Settlement, Mediation and Trial

Submitted by Ralph R. Smith

CAPEHART SCATCHARD
ATTORNEYS AT LAW

How to Win at Settlement, Mediation and Trial

Presented to:

National Business Institute

By

Ralph R. Smith, 3rd, Esq.
rsmith@capehart.com
856.914.2079

When the Case Comes In

- Review Complaint – Can it be dismissed or claims limited by a motion to dismiss?
- Investigate claim with client
- Figure out witnesses/preserve information
- Get personnel file and any other relevant documentation

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When the Case Comes In

- In filing Answer, determine potential affirmative defenses and raise them

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Discovery

- My preference: get discovery out contemporaneously with filing answer – know what you need to prove to win, then get it!
- Interrogatory and document requests
- Admissions requests? Maybe
- Know the court rules – any limits on discovery? – initial disclosures?

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Mediation

- NJ Court rules on early mediation
- Approaches to mediation

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Depositions

- Figure out key witnesses – depose them – know what you need to get from them to put case in positon for possible summary judgment
- Prepare, Prepare, Prepare
- Your own witness – Prepare, Prepare, Prepare

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Summary Judgment Rulings

- Increased chances of success if you base on other sides' testimony than your own
- File when you think you have a chance to win – if not, don't file

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Trial

- Know rules of court and judge
- Use of strategic *in limine* motions
- Prepare, Prepare, Prepare – know your case and know the law
- Directed Verdict Motion

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Settlement

- When to settle?
- What do you want in settlement agreement?
- No admission of liability
- Full release of claims/know special rules for age claims
- Confidentiality? Proceed with caution

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Questions

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ATTORNEYS AT LAW

Thank you.

Ralph R. Smith, Esq.
Co-Chair, Labor & Employment Group

Capehart & Scatchard, P.A.

Mt. Laurel, NJ ◆ Philadelphia, PA

856.914.2079

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Upholding Ethical Standards

Submitted by M. Trevor Lyons

ETHICAL ISSUES IN EMPLOYMENT LAW

By: M. Trevor Lyons
WALSH PIZZI O'REILLY FALANGA LLP
Three Gateway Center
100 Mulberry Street,15th Floor
Newark, NJ 07102
(973) 757-1100

I. RECURRENT ETHICAL CONCERNS AND THE RULES OF PROFESSIONAL CONDUCT

There are many different possible ethical issues that may confront an attorney who represents employers. There are, however, a few recurring problems that are commonly confronted by those representing employers. One such recurring problem is the issue of *ex parte* contacts.

1. *EX PARTE* CONTACTS

The vast majority of states' ethics rules are modeled after the ABA's Model Rules of Professional Conduct. In fact, New Jersey's Rules of Professional Conduct ("RPCs") were adopted and revised from the ABA Model Rules of Professional Conduct. Accordingly, while there may be some local variation in your states' ethical guidelines, it is likely that the vast majority of issues will be similar. For the sake of discussion, however, I have included and will make reference only to New Jersey's RPCs so that the case law and analysis that follow have an appropriate context.[1]

A. THE RELEVANT NEW JERSEY RPCs

The RPCs governing *ex parte* contacts are:

1. RPC 1.13 "Organization as the Client"

> (a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 or 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also members of its litigation control group. Members of the

[1] The District of New Jersey's Local Rule 103.1(a) adopts New Jersey's RPC for the conduct of attorneys appearing before that Court.

litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in the litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

2. RPC 4.2 "Communication with Person Represented by Counsel"

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

3. RPC 4.3 "Dealing with Unrepresented Person; Employee of Organization"

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so

> represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

B. GENERAL DISCUSSION ON AVOIDING *EX PARTE* CONTACTS

In January 1996, New Jersey's Supreme Court amended the above referenced RPC's to clarify and narrow the scope of the prohibition against ex parte contacts.[2] As a practical matter, the key to understanding these prohibitions is understanding who is a member of a party's litigation control group. New Jersey's RPCs have a very narrow definition of "litigation control group," and thus, place relatively few limits on an attorney's ability to conduct ex parte interviews of employees of an organization. Specifically, New Jersey's RPCs do not prohibit ex parte contacts simply because the person is a management employee, because the person is a fact witness, or because the person's acts or omissions may subject the organization to liability. Rather, under RPC 1.13, an employee is considered to be a member of the litigation control group only if he or she is "responsible for, or significantly involved in, the determination of the organization's legal position in the matter." RPC 1.13 further provides that "significant involvement requires involvement greater, and other than, the supplying of factual information or data respecting the matter." Accordingly, only those employees of a corporation directly responsible or significantly involved in making decisions regarding the corporation's legal process are protected. Typically, this is only a small group of upper level management and in-house counsel.

In addition, counsel should recognize that former employees are presumed to be represented by the organization, but can disavow such representation. It is also important to remember that persons who are not part of the litigation control group may still be represented or have a right to be represented by counsel. RPC 4.3 requires an attorney to use reasonable diligence to find out if a person has a right to representation by the corporation upon request, and to tell a witness that it is the attorney's understanding that the person is not represented by the corporation.

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[2] See Andrews v. Goodyear Tire and Rubber, Inc., 191 F.R.D. 59, 77 (D.N.J. 2000)(provides an in depth discussion regarding the adoption of the present prohibition against ex parte contacts and the scope of RPC 1.13); Klier v. Sordoni Skanska Constr. Co., 337 N.J. Super. 76 (App. Div. 2001).

The other key aspect of the rules prohibiting ex parte contacts is the obligation to use reasonable diligence to determine whether a party is represented. In addition to being required to ask someone if they are represented by counsel and not telling a prospective witness that you are disinterested, it is generally a good idea to follow the general parameters of the script set forth in In Re Prudential Ins. Co. Of America Sales Practice Litigation, which states:

> The script should ensure that the interviewer--who should be an attorney--identifies himself, his employer, his client, the nature of and parties to the pending action and its adversarial character. The interviewer should inform the potential interviewee that she need not speak to the interviewer, that she may wish an attorney and that if, during her employment with [the company], she ever engaged in discussion with [the company] counsel regarding this lawsuit or the circumstances from which it arose, she should not reveal it.

In Re Prudential Ins. Co. Of America Sales Practice Litigation, 911 F. Supp. 148, 152 n. 5 (D.N.J. 1995).

The penalties for committing an impermissible ex parte contact are steep. They include possible exclusion of evidence and disqualification of counsel. An attorney may also face disciplinary consequences including possible suspension for violating R.P.C. 4.2. Thus, careful attention to the problems posed by possible representation is a must.

By far the most recurrent problem is the question of joint representation of multiple defendants. Specifically, when both a corporate and an individual supervisor have been sued, a client for both financial and tactical reasons, often wants to have a single attorney represent both parties. Accordingly, defense counsel may initially be requested to defend both parties. While often times such joint representation is permissible, defense counsel should be aware of the ethical restrictions on representing parties with even a potential conflict of interest.

II. CONFIDENTIALITY

There are really only two reoccurring issues with respect to confidentiality for employment attorneys: (1) maintaining the privilege; and (2) complying with the general obligation to maintain a client's confidences.

1. MAINTAINING THE PRIVILEGE

The obvious purpose of the attorney client privilege and the work product doctrine is to encourage clients to make full disclosures so that lawyers can give fully informed advice and to keep an attorney's thought processes and opinion from litigation opponents. Because lawyers representing corporations and other organizations often owe their fundamental allegiance to the entity, not to any of its officers, directors, mangers or employees, it must be determined which individuals within the entity are included within the scope of the attorney-client privilege.

A. THE TEST FOR DETERMINING WHO IS COVERED BY THE PRIVILEGE

While the Court in Upjohn v. U.S., 449 U.S. 383 (1981), held that the attorney-client privilege and the work product doctrine apply to internal investigations, the Court also expanded the previously articulated control test. Unfortunately, however, the Court did not expressly set forth the parameters or elements of this new test. What has emerged however, is that generally, in federal courts, the attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[3]

B. ONLY COMMUNICATIONS PROTECTED

The attorney-client privilege only protects disclosure of contents of communications themselves between an attorney and the attorney's client. It does not protect against disclosure of the underlying facts by the person who has personal knowledge of those facts, even though that person consulted an attorney.[4]

C. WAIVER OF THE PRIVILEGE

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[3] See e.g. Diversified Indust., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir.1981)(rejecting Diversified's holding on other grounds).

[4] Upjohn Co., 449 U.S. at 395-96.

Voluntary disclosure of the information or documents to an adversary, whether real or potential, disclosure to third parties or others not essential to the representation, or failing to timely assert the attorney-client privilege when confidential information was sought through the discovery process, may result in the inadvertent waiver of the attorney client privilege.[5] The attorney-client privilege may also be implied to be waived by the following conduct: (1) some affirmative act, such as filing suit, by the asserting party[6]; (2) through his affirmative act, the asserting party put the protected information at issue by making it relevant to the case[7]; and (3) application of the privilege would have denied the opposing party access vital to his defense.[8]

D. INVESTIGATION AND ADVICE BY ATTORNEYS

Typically in the harassment context, but sometimes for other employment related investigations, an attorney will be asked to perform an investigation or render advice that will form part of an affirmative defense of the employer at trial. Typically, in this context whether privilege will apply is determined on a case by case basis. If the attorney was acting as legal advisor and the communication provided legal advice, the communications at issue will be found to be privileged.[9] In addition, where the investigative materials are reasonably segregated from the attorney's advice and other privileged communications and the plaintiff is afforded full discovery regarding all aspects of the investigation, courts have held that the attorney-client privilege has not been waived unless a substantial portion of attorney-client communication has been disclosed to third parties.[10]

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[5] Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423-27 (3d Cir.1991); Permian Corp. v. United States, 665 F.2d 1214, 1219-22 (D.C.Cir.1981); United States v. AT & T, 642 F.2d 1285, 1299 (D.C. Cir.1980).

[6] Pamida Inc. v. E.S. Originals, Inc., 281 F.3d 726 (8th Cir. 2002)(retailer waived privilege by bringing indemnification action); United States v. Titchell, 261 F.3d 348 (3rd Cir. 2001)(calling an attorney as a fact witness waives privilege.

[7] Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir.1994)(client who asserts that he relied upon the advice of counsel waives the privilege).

[8] Kirchner v. Mitsui & Co. (U.S.A.), Inc., 184 F.R.D. 124 (M.D. Tenn. 1998); Pappas v. Holloway, 114 Wash.2d 198, 207, 787 P.2d 30 (1990).

[9] Waugh v. Pathmark Stores, Inc., 191 F.R.D. 427, 432 (D.N.J. 2000).

[10] Id.

To the extent that a plaintiff is relying on his/her attorney's advice and actions to support an affirmative defense, a report generated and any legal advice provided may have to be disclosed.[11] An attorney may also request that a client record his or her recollections and thoughts about the circumstances of the case to assist the attorney's analysis. So long as the record was made for the purpose of seeking legal advice and assistance, the communications should remain protected.[12] However, notes taken by a non-lawyer investigating harassment allegations have been deemed gathered for a non-litigation purpose and are not privileged.[13]

2. MAINTAINING CLIENT CONFIDENCES AND PERSONAL IDENTIFIERS

A. THE RELEVANT NEW JERSEY RPCs

1. RPC 1.6 "Confidentiality of Information"

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).
>
> (b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
>
> > (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
> >
> > (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

[11] Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (App. Div. 1996).

[12] In Re Auclair, 961 F.2d 65 (5th Cir. 1992) (communication with attorney for purpose of securing legal advice protected even where attorney ultimately declines representation); Perkins v. Gregg County, Texas, 891 F. Supp. 361, 363-64 (E.D. Tex. 1995) (employee's verbal "notes" on tape of his conversations with his former employers were made for the purpose of seeking legal advice and assistance. They are therefore protected by attorney-client privilege, even though attorney ultimately declined representation).

[13] EEOC v. Commonwealth Edison, 119 F.R.D. 394, 395 (N.D. Ill. 1988).

> (c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.
>
> (d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;
> >
> > (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved;
> >
> > (3) to prevent the client from causing death or substantial bodily harm to himself or herself; or
> >
> > (4) to comply with other law.
>
> (e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

B. GENERAL DISCUSSION ON MAINTAINING CONFIDENTIALITY

There are only two issues of particular relevance to employment attorneys with respect to the general duty to maintain client confidences and both involve the maintenance of electronic data in today's information heavy litigation. The first is that there is an emerging body of law under RPC 1.6 that requires law firms to take reasonable measures to protect the confidentiality of clients' electronically stored information. Specifically, there is recent case law defining what is reasonable in terms of electronic data protocols and preventative steps to prevent client confidences from being hacked or otherwise disclosed. While not unique to employment law, given the emerging use and relevance of ESI in employment litigation, lawyers should make sure that

reasonable steps are being taken to protect such ESI from inadvertent or other hacked disclosure.

Second, in addition to the ethical and common law duties to protect client information, various state and federal statutes and regulations require protection of defined categories of personal information. In New Jersey, the "Identity Theft Prevention Act," which took effect on January 1, 2006, specifically protects social security numbers and other personal identifiers from disclosure. These restrictions would apply to lawyers who possess any specified personal information about their employees, clients, clients' employees or customers, opposing parties and their employees, or even witnesses. Given that employment lawyers are often the recipients of this type of personal information, this is becoming an increasing concern in employment litigation. Additionally, spoliation claims are becoming more prevalent in employment litigation and extra steps should be taken to preserve electronically stored data throughout the course of an employment litigation.

III. CONFLICTS OF INTEREST

1. JOINT REPRESENTATION OF MULTIPLE DEFENDANTS

As previously noted, all references herein will be made to New Jersey's RPCs, which, because they are based in large part on the ABA Model Rules of Professional Conduct, should be applicable to similar situations arising in other jurisdictions.

A. THE RELEVANT NEW JERSEY RPCs

The RPCs relevant to joint representation of multiple parties in employment litigations are:

1. RPC 1.7 "Conflict of Interest: General Rule"

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

2. RPC 1.8 Conflict of Interest: Current Clients; Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) A non-profit organization authorized under R. 1:21-1(e) may provide financial assistance to indigent clients whom it is representing without fee.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and

(3) information relating to representation of a client is protected as required by RPC 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, unless each client gives informed consent after a consultation that shall include disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advise of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses, (2) contract with a client for a reasonable contingent fee in a civil case.

(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

3. RPC 1.9 "Duties to Former Clients"

(a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to

> a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.
>
> (d) A public entity cannot consent to a representation otherwise prohibited by this Rule.

B. GENERAL DISCUSSION ON JOINT REPRESENTATION OF MULTIPLE DEFENDANTS

Joint representation of co-defendants in an employment discrimination case may create a conflict of interest. Under RPC 1.7, the determinative issue is whether there is an adversity of interests or the possibility that such a conflict will occur in the joint representation of co-defendants. Generally, because employers are held vicariously liable for acts of discrimination that result in a tangible job detriment, there typically is no conflict between a supervisor/decision-maker and an employer. The exception, however, occurs when an attorney is asked to defend against a harassment claim, and it is in the employer's interest to claim that the alleged harasser's conduct was done without the approval and consent of the employer, and that when the employer learned of the employee's conduct it took prompt and remedial action including disciplining the alleged harasser. This potential for conflict is exacerbated when the harassment claim is brought under New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1 *et. seq*. and the alleged harasser faces individual liability under that statute's aiding and abetting provisions, N.J.S.A. 10:5-12(e).

Before taking on this type of representation, the attorney must carefully review the facts of the specific case. This investigation may include an interview of the supervisory employee. The attorney should advise the supervisor at that point that he represents the employer and that any privilege which may attach to their conversation belongs to the company.[14] In addition, the attorney should advise the employee being interviewed that:

[14] Montgomery v. Kohn, 50 F. Supp. 2d 344 (D.N.J. 1999) (Counsel disqualified for failing to properly notify witness during an investigation that counsel represented employer).

1. He or she is conducting the interview to provide advice to the company and to determine the facts concerning the plaintiff's complaint;

2. Anything said by the employee will be disclosed to the company;

3. The meeting is covered by the attorney-client privilege, however, it inures to the benefit of the company;

4. The meeting is confidential[15];

5. The individual is not to disclose what is discussed; and

6. The company will not retaliate for any statements the employee makes, but it reserves the right to discipline based upon its determination of the truth of the allegations being made.

Many attorneys require an employee who is being interviewed to execute a writing stating that they acknowledge that they have been informed of each of the above subjects. In addition, the attorney should review the various claims and defenses of each party and make a complete disclosure to each potential client of any possible claims that might be made by one client against another. If it is determined that joint representation of an employer and an employee is advisable and the individual employee agrees to joint representation, the attorney should, for his or her own protection, reduce the agreement to writing in what is commonly referred to as a "joint representation letter." The joint representation letter should generally address the following topics:

1. Identification of law firm and lawyer;

2. Requirement that agreement be signed prior to the commencement of any representation;

3. Identification of clients;

4. Scope of representation;

5. Termination of the representation;

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[15] The NLRB recently issued a decision, *Banner Estrella Medical Center*, that calls into question whether an employer can instruct employees to keep an investigation confidential and not discuss it with co-workers. The EEOC is also taking the same position. Nonetheless, these position are not absolute and do not appear to be well grounded. I would continue this practice until these issues are passed upon the federal courts.

6. Potential conflicts of interest, including;

   a. Right to retain own separate counsel at own expense;

   b. Lack of any present conflicts or waiver of same;

   c. Disclosure of any future conflict;

   d. Client's right to obtain separate counsel at any time;

   e. Consent to the attorney's right to remain as counsel for the employer if a conflict arises;

7. Prospective waiver of conflict; and

8. Indemnification issues and waiver of cross-claim against employer.

In New Jersey, to effect a valid waiver of a contemporaneous conflict, our courts require a "knowing and voluntary" waiver.[16] Therefore, an attorney must disclose the risks as well as the advantages to joint representation and the disadvantages "should be stated and laid before the client at some length. . ." and in a timely fashion.[17] No less of a disclosure should be provided if an attorney wants to obtain a prospective waiver from an individual defendant in employment litigation.

RPC 1.9(a) states that a lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client consents after full disclosure of the circumstances and consultation. In addition, a lawyer cannot use information gained from representing a former client to the former client's disadvantage. Prior to December of 2003, RPC 1.9 required a two-step analysis. First, an attorney was required to determine whether there was an actual conflict. If there was not, then the attorney was required to still determine whether there was an appearance of impropriety in the representation. The appearance of impropriety

[16] In Re Dolan 76 N.J. 1, 13 (1978) (Supreme Court will not enforce consents to a conflict of interest "which are less than knowing, intelligent and voluntary.")

[17] In re Lanza. 65 N.J. 347, 352 (1974).

provisions, however, were eliminated from RPC 1.9 in December of 2003, and it is not clear whether any portion of the second step analysis remains.

Key to determining whether an actual conflict exists among sequential representations that would prevent an attorney from representing a client is whether there is a substantial relationship between the matters. New Jersey uses a three-prong test to determine if there is an actual conflict warranting disqualification of the attorney under RPC 1.9. This test requires an analysis of the following criteria:

1. the existence of a prior attorney-client relationship;
2. that the interests of the attorney's current client are materially adverse to the former client; and
3. the "same or substantially related" matters are involved in the representations.[18]

Criteria one and two are generally not disputed, but disagreements frequently arise over whether the matters are substantially related. "Substantially related" means that there is a factual nexus between the two cases.[19] If the matters are deemed to be substantially related, the court presumes that the attorney has acquired confidential information from the former client. The presumption is irrefutable and disqualification must occur, unless the former client consents after full disclosure.

Finally, the consequences of representing clients with conflicting interests are harsh. They include disciplinary action, disqualification and even the forfeiture of fees already earned.

IV. ASSESSING ATTORNEYS' FEES

There are two types of issues involving attorneys' fees in employment cases. The first is the ethical consideration regarding the fees being charged to the client. The second is the practical effect that the attorneys' fees shifting provision of many employment statutes has on the course of an employment litigation.

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[18] Essex Chemical Corp. v Hartford Ace. & Indem. Co., 993 F. Supp. 241, 246 (D.N.J. 1998); Host Marriott Comp. v. Fast Food Operators, 891 F. Supp. 1002, 1007 (D.N.J. 1995).

[19] See Opinion 655, (December 9, 1991).

A. THE RELEVANT NEW JERSEY RPCs

1. RPC 1.5 "Fees"

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall

> provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
>
> (d) A lawyer shall not enter into an arrangement for, charge, or collect:
>
> > (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
> >
> > (2) a contingent fee for representing a defendant in a criminal case.
>
> (e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:
>
> > (1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
> >
> > (2) the client is notified of the fee division; and
> >
> > (3) the client consents to the participation of all the lawyers involved; and
> >
> > (4) the total fee is reasonable.

B. GENERAL DISCUSSION ON ASSESSING ATTORNEY FEES

1. An informed decision about representation

The first ethical obligation in the fee context is disclosure. RPC 1.4(b) requires attorneys to provide clients with the information reasonably necessary to permit them to make informed decisions regarding a representation. Without disclosure of all relevant information to the client, the client's choice of a fee arrangement has been held to be "illusory."

2. Is The Fee Reasonable/ Is The Form Of The Fee Reasonable?

The requirement of RPC 1.5 that any fee incurred be reasonable is the only requirement that applies to every type of fee arrangement. "Reasonable" means at least two things:

- The *type* of fee arrangement entered into has to be fair; and
- The *amount* of the fee has to be fair.

For example, In re Reisdorf, 80 N.J. 319, 322 (1979), the New Jersey Supreme Court found that a contingent fee arrangement between a lawyer and a widow in a contested probate matter was unfair and unreasonable because there was only a minimal risk of nonpayment assumed by the attorney, and the attorney had not informed the client—who did not have much money—that under Rule 4:42-9, the attorney's fee may be paid from the estate without regard to the amount of the client's recovery. Reisdorf stands for at two important principles. First, an attorney has to assume *some risk* of nonpayment to justify a fee based on a contingency instead of the value of services rendered. Second, no type of agreement can be reasonable unless the client knows enough to make an informed choice about it. This applies to all fees, contingent and otherwise. Obviously, these factors are in addition to those actually listed in RPC 1.5.

3. The Necessity Of A Signed Writing (A Retainer Agreement)

All contingent fee arrangements have to be in writing, and signed by the client, whether the client is a longstanding one or not. A duplicate has to be given to the client. This applies as well to negative contingency agreements or any other arrangements where a lawyer charges a premium based on the result achieved. This procedure is different from the procedure for non-contingency situations, where the client does not have to sign the agreement, and where a fee agreement may not be necessary for longstanding clients. When the client is not a longstanding client, RPC 1.5 requires a signed retainer agreement.

4. Written basis for fee calculation

Regardless of the type of fee arrangement, RPC 1.5(b) requires that the basis of the fee be communicated in writing to any client the lawyer has not regularly represented. Therefore, disclose in the engagement letter *all* charges for which the client will be financially responsible. Disputes can easily be avoided by providing a clear, written statement to each client at the beginning of each separate matter, describing the precise manner in which payment is expected. It helps the client and the practitioner. The alternative is a good deal of unnecessary grief.

5. Prohibited provisions

A fee arrangement should not contain the following:

- Pre authorization to settle without consultation with the client;
- Restrictions on the right of the client to terminate the relationship;
- Limitations on liability;
- Commercial or other non-fee arbitration provisions; or
- Advanced waiver of a conflict.

Non-refundable retainers are only permissible where the attorney is foregoing other work to stand ready to perform the work of the client.

6. Fee arbitration

As an alternative to court action, the Supreme Court of New Jersey has created 17 district fee arbitration committees, which resolve through binding arbitration, disputes concerning alleged unreasonable fees. The fee arbitration procedure is not available in every case. A fee committee may, in its discretion, decline to arbitrate fee disputes regarding matters in which no lawyer's services have been rendered for at least two years or in which the total legal fee exceeds $100,000. The fees in some kinds of cases, such as worker's compensation cases, are determined by the court and are not subject to fee arbitration. A fee committee may further decline to arbitrate disputes in which persons who are not parties to the arbitration have an interest that would be substantially affected by the arbitration, such as where someone other than the client will have to make payment on a fee award. Similarly, when the primary issues in dispute raise substantial legal questions, in addition to the basic fee dispute, such as claims of legal malpractice, the fee committee may decline to hear the case. Finally, fee committees may not arbitrate a fee for legal services rendered by the Public Defender's Office.

C. ATTORNEY FEES AND ENHANCEMENT UNDER NEW JERSEY'S LAW AGAINST DISCRIMINATION

In any employment action or proceeding under the LAD [and most other employment statutes], the prevailing party may be awarded a reasonable counsel fee. Fees may be assessed against a public body that will have to pay them from tax dollars. However, fees may not be assessed against a losing plaintiff unless it is determined that

the case was brought in bad faith. "Bad faith" is a subjective standard and requires more than a finding that a complaint was frivolous or meritless.

A "prevailing party" has been described as one who has achieved a substantial portion of the relief it sought; one who has succeeded on any significant portion of the relief it sought.

1. Amount and Calculation of Fees.

The amount of counsel fees is within the sound discretion of the tribunal. The proper starting point is calculating the "lodestar" amount, which is the number of hours reasonably necessary to successfully prosecute the claim times a reasonable hourly rate. "Trial courts should not accept passively the submissions of counsel to support the lodestar amount. The lodestar calculation requires the court to carefully and critically evaluate the hours and the hourly rate put forth by counsel. The party requesting the fee bears the burden of proving that it is reasonable.

Hourly rates must be "fair, realistic and accurate." To take into account delay in payment, the hourly rate at which compensation is to be awarded should be based on current rates rather than those in effect when the services were performed.

Compensable time is that which is reasonably necessary. Unproductive or duplicative time should not be included. Hours that would not be billed to one's client should not be "billed" to one's adversary under statutory authority. The lodestar may be reduced to account for a partial loss or limited success. However, a proportional reduction in the lodestar "based simply or solely on a mathematical approach comparing the total number of issues in the case with those actually prevailed upon cannot serve as the basis for determining a reasonable fee for the prevailing party. The method to be used rests in the equitable discretion of the court.

The records supporting a fee application must be "sufficiently detailed" to permit the tribunal to make an independent assessment of whether the hours claimed are

justified. Contemporaneously kept time sheets normally will be required. The subject matter of the time expenditures must be identified in a manner that allows the tribunal to determine their reasonableness with a "high degree of certainty." Vague entries and terse summaries will not suffice to support a fee award.

While the amount of the compensatory damages award may be taken into account in awarding attorney's fees, there is no rule that the fees must be less than the damages.

2. Enhancement

A trial court, after having carefully established the amount of the lodestar fee, may consider whether to increase that fee to reflect the risk of nonpayment in cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome.

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